RECORD AND 1 BRIEFS

FILED
APR 27 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 16-299

In the Supreme Court of the United States

NATIONAL ASSOCIATION OF MANUFACTURERS,

Petitioner,

v.

U.S. DEPARTMENT OF DEFENSE,
DEPARTMENT OF THE ARMY CORPS OF ENGINEERS, AND
U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the court of appeals has original jurisdiction under 33 U.S.C. § 1369(b)(1) over a petition for review challenging a regulation that defines the scope of the term "waters of the United States" in the Clean Water Act.*

---

* This is the Question Presented by the Solicitor General in his brief in opposition. The Question Presented in the petition for certiorari asked whether the Sixth Circuit erred in holding that it had jurisdiction under 33 U.S.C. § 1369(b)(1)(F). In the brief in opposition, the Solicitor General also defended the judgment on the alternative ground—presented below but rejected by the court of appeals—that the court of appeals had original jurisdiction under 33 U.S.C. § 1369(b)(1)(E). Petitioner therefore has rephrased the question pursuant to this Court's Rule 24.1(a) to more accurately reflect the procedural posture of the case. Jurisdiction under both Subsections was briefed and decided below, briefed by the parties at the certiorari stage, and petitioner addresses both in this brief.

PARTIES TO THE PROCEEDINGS BELOW

After the Judicial Panel on Multidistrict Litigation consolidated the petitions for review in the Sixth Circuit (Consolidation Order, Dkt. No. 3, MCP No. 135 (JPML July 28, 2015)), the Sixth Circuit permitted petitioner here, the National Association of Manufacturers, to intervene as a respondent. Order, No. 15-3751 cons. (Sept. 16, 2015).

Respondents below—the federal agency respondents here—are the U.S. Environmental Protection Agency; E. Scott Pruitt, in his official capacity as EPA Administrator; the U.S. Army Corps of Engineers; Lieutenant General Todd T. Semonite, in his official capacity as the Corps' Chief of Engineers and Commanding General; the Acting Assistant Secretary of the Army (Civil Works) in his or her official capacity; and Robert M. Speer, in his official capacity as Acting Secretary of the Army.

State intervenor-respondents below and respondents here are the States of New York, Connecticut, Hawaii, Massachusetts, Oregon, Vermont, Washington, and the District of Columbia.

Over 100 other parties filed 22 petitions for review below, and intervened in other petitions, and many of those petitioners moved to dismiss their own and other petitions for review for want of jurisdiction. Those petitioners below, respondents here, are as follows:

No. 15-3751: Murray Energy Corporation.

No. 15-3799: States of Ohio, Michigan, and Tennessee.

No. 15-3817: National Wildlife Federation.

No. 15-3820: Natural Resources Defense Council, Inc.

No. 15-3822: State of Oklahoma.

No. 15-3823: Chamber of Commerce of the United States; National Federation of Independent Business; State Chamber of Oklahoma; Tulsa Regional Chamber; and Portland Cement Association.

No. 15-3831: States of North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, Wyoming, New Mexico Environment Department, New Mexico State Engineer.

No. 15-3837: Waterkeeper Alliance; Center for Biological Diversity; Center for Food Safety; Humboldt Baykeeper; Russian Riverkeeper; Monterey Coastkeeper; Upper Missouri Waterkeeper, Inc.; Snake River Waterkeeper, Inc.; Turtle Island Restoration Network, Inc.

No. 15-3839: Puget SoundKeeper; Sierra Club.

No. 15-3850: American Farm Bureau Federation; American Forest & Paper Association; American Petroleum Institute; American Road and Transportation Builders Association; Greater Houston Builders Association; Leading Builders of America; Matagorda County Farm Bureau; National Alliance of Forest Owners; National Association of Home Builders; National Association of Realtors; National Cattlemen's Beef Association; National Corn Growers Association; National Mining Association; National Pork Producers Council; National Stone, Sand, and Gravel Association; Public Lands Council; Texas Farm Bureau; and U.S. Poultry & Egg Association.

No. 15-3853: States of Texas, Louisiana, and Mississippi; Texas Department of Agriculture; Texas Commission on Environmental Quality; Texas Department of Transportation; Texas General Land Office; Railroad Commission of Texas; Texas Water Development Board.

No. 15-3858: Utility Water Act Group.

No. 15-3885: Southeastern Legal Foundation, Inc.; Georgia Agribusiness Council, Inc.; Greater Atlanta Homebuilders Association, Inc.

No. 15-3887: States of Georgia, West Virginia, Alabama, Florida, Indiana, Kansas; Commonwealth of Kentucky; North Carolina Department of Environment and Natural Resources; States of South Carolina, Utah, and Wisconsin.

No. 15-3948: One Hundred Miles; South Carolina Coastal Conservation League.

No. 15-4159: Southeast Stormwater Association, Inc.; Florida Stormwater Association, Inc.; Florida Rural Water Association, Inc., and Florida League of Cities, Inc.

No. 15-4162: Michigan Farm Bureau.

No. 15-4188: Washington Cattlemen's Association; California Cattlemen's Association; Oregon Cattlemen's Association; New Mexico Cattle Growers Association; New Mexico Wool Growers, Inc.; New Mexico Federal Lands Council; Coalition of Arizona/New Mexico Counties for Stable Economic Growth; Duarte Nursery, Inc.; Pierce Investment Company; LPF Properties, LLC; Hawkes Company, Inc.

No. 15-4211: Association of American Railroads; Port Terminal Railroad Association.

No. 15-4234: Texas Alliance for Responsible Growth, Environment and Transportation.

No. 15-4305: American Exploration & Mining Association.

No. 15-4404: Arizona Mining Association; Arizona Farm Bureau; Association of Commerce and Industry; New Mexico Mining Association; Arizona Chamber of

Commerce & Industry; Arizona Rock Products Association; and New Mexico Farm & Livestock Bureau.

Many of these petitioners in the court of appeals also filed complaints in district courts. Those actions are *North Dakota* v. *EPA*, No. 3:15-cv-59 (D.N.D.); *Murray Energy Corp.* v. *EPA*, No. 1:15-cv-110 (N.D. W. Va.); *Ohio* v. *EPA*, 2:15-cv-2467 (S.D. Ohio); *Am. Farm Bureau Fed'n* v. *EPA*, No. 3:15-cv-165 (S.D. Tex.); *Texas* v. *EPA*, No. 3:15-cv-162 (S.D. Tex.); *Ass'n of Am. Railroads* v. *EPA*, No. 3:15-cv-266 (S.D. Tex.); *Georgia* v. *McCarthy*, No. 2:15-cv-79 (S.D. Ga.); *Oklahoma ex rel. Pruitt* v. *EPA*, No. 4:15-cv-381 (N.D. Okla.); *Chamber of Commerce* v. *EPA*, No. 4:15-cv-386 (N.D. Okla.); *Southeastern Legal Foundation* v. *EPA*, No. 1:15-cv-2488-TCB (N.D. Ga.); *Washington Cattlemen's Association* v. *EPA*, No. 0:15-cv-3058 (D. Minn.); *Puget Soundkeeper Alliance* v. *McCarthy*, No. 2:15-cv-1342 (W.D. Wash.); *Waterkeeper Alliance* v. *EPA*, No. 3:15-cv-3927 (N.D. Cal.); *Natural Resources Defense Council* v. *EPA*, No. 1:15-cv-1324 (D.D.C.); *Am. Exploration & Mining Ass'n* v. *EPA*, No. 1:15-cv-1323 (D.D.C.); and *Arizona Mining Ass'n* v. *EPA*, No. 2:15-cv-1752 (D. Az.).

CORPORATE DISCLOSURE STATEMENT

Petitioner National Association of Manufacturers is a not-for-profit public advocacy group. It has no parent corporation and does not issue stock.

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BRIEF FOR PETITIONER[1]

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-47a) is reported at 817 F.3d 261. The court of appeals' denial of rehearing en banc, which is unreported, is reproduced at Pet. App. 51a-52a.

JURISDICTION

The judgment of the court of appeals denying all motions to dismiss the petitions for review for lack of jurisdiction was entered on February 22, 2016. Pet. App. 48a-50a. The court of appeals' order denying rehearing en banc was entered on April 21, 2016. *Id.* at

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[1] Petitioner the National Association of Manufacturers ("the NAM") filed suit challenging the waters of the United States Rule in district court as part of a broad-based coalition of 18 industry groups. *Am. Farm Bureau Fed'n, et al.* v. *EPA*, No. 3:15-cv-165 (S.D. Tex.). When that coalition also filed a protective petition for review in the Sixth Circuit, it agreed that the NAM would *not* join the petition, so as to ensure that the NAM could challenge the Sixth Circuit's jurisdiction.

The NAM's fellow coalition members, petitioners in No. 15-3850, filed a brief as respondents in support of the NAM's certiorari petition. These respondents—the American Farm Bureau Federation; American Forest & Paper Association; American Petroleum Institute; American Road and Transportation Builders Association; Greater Houston Builders Association; Leading Builders of America; Matagorda County Farm Bureau; National Alliance of Forest Owners; National Association of Home Builders; National Association of Realtors; National Cattlemen's Beef Association; National Corn Growers Association; National Mining Association; National Pork Producers Council; National Stone, Sand, and Gravel Association; Public Lands Council; Texas Farm Bureau; and U.S. Poultry & Egg Association—each fully supports and joins in the arguments made in this brief and will not be filing a separate brief.

51a. On July 1, 2016, Justice Kagan extended the time to file a petition for certiorari to September 2, 2016. This Court granted a timely filed petition for certiorari on January 13, 2017. Jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTES AND REGULATION INVOLVED

Relevant portions of the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, are reproduced in an Addendum. The Waters of the United States Rule ("WOTUS Rule" or "Rule") is published at *Clean Water Rule: Definition of "Waters of the United States,"* 80 Fed. Reg. 37,054 (June 29, 2015).

STATEMENT

A. Introduction

Section 509(b) of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1369(b), provides for "judicial review in the United States courts of appeals of various particular actions by the [EPA] Administrator." *Middlesex County Sewerage Auth.* v. *Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 13-14 (1981). The seven categories of action specified in Section 1369(b)(1) are EPA Administrator action

> (A) in promulgating any standard of performance under section 1316 of this title [for new sources of discharges],
>
> (B) in making any determination pursuant to section 1316(b)(1)(C) of this title,
>
> (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title [for toxic pollutants or pollutants introduced into treatment works],

> (D) in making any determination as to a State permit program submitted under section 1342(b) of this title,
>
> (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title,
>
> (F) in issuing or denying any permit under section 1342 of this title, and
>
> (G) in promulgating any individual control strategy under section 1314(*l*) of this title [to address toxic pollutant discharges] * * *.

Jurisdiction in the courts of appeals over challenges to those EPA actions is not only original, but also "exclusive." *Decker* v. *Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1334 (2013). And "an application for review must be lodged in the court of appeals within 120 days of the Administrator's action, §1369(b)(1)." *Ibid.*

Challenges to final agency action under the CWA not covered by Section 1369(b)—including all actions by the U.S. Army Corps of Engineers ("Corps") in administering permits for discharges of dredged and fill material under Section 1344—are governed by the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* ("APA"). The APA provides that "[a] person suffering legal wrong" or "adversely affected or aggrieved by agency action" may bring suit in district court for judicial review of any "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. §§ 702, 704. An APA suit may be brought within six years of the challenged agency action. 28 U.S.C. § 2401(a).

Section 1369(b) thus "extends only to *certain* suits challenging *some* agency actions" taken by *one* of the federal agencies that, along with the States, are

responsible for implementing the CWA. *Decker*, 133 S. Ct. at 1334 (emphasis added). Litigants whose claims fall outside those narrow confines may invoke the jurisdiction of the district court under the APA and 28 U.S.C. § 1331.[2]

In this case, challengers filed numerous petitions for review of the final WOTUS Rule promulgated jointly by EPA and the Corps. 80 Fed. Reg. 37,054 (June 29, 2015). That Rule significantly revised the scope of the Clean Water Act by redefining the phrase "the waters of the United States." Rejecting intervenor the NAM's and other motions to dismiss the petitions for lack of jurisdiction, the Sixth Circuit held that it had original jurisdiction over the rule challenges by virtue of Section 1369(b)(1)(F). Following circuit precedent that the judge who supplied the controlling vote deemed "incorrect" (Pet. App. 44a), the majority held that the petitions for review fell under Subsection (F) because they challenged an EPA "regulation 'governing'" permitting pursuant to the National Pollutant Discharge Elimination System ("NPDES") established in 33 U.S.C. § 1342. Pet. App. 44a.

The agencies, in their brief in opposition to certiorari, defended the Sixth Circuit's judgment on the additional ground—rejected by the majority below—that the WOTUS Rule falls under Section 1369(b)(1)(E) because it "approv[es] or promulgat[es] any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345." See Br. for Fed. Resps. in Opp. 11, 13-14 ("Fed. BIO"). Accordingly, the applicability of both

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[2] Section 1365 governs citizen enforcement actions, including claims that the Administrator failed to perform a non-discretionary duty. Congress provided that "[t]he district courts shall have jurisdiction" over such claims. 33 U.S.C. § 1365(a).

Subsections (E) and (F) to the petitions for review is before this Court.

A majority of the Sixth Circuit panel correctly recognized that it is "illogical and unreasonable" to conclude that either Subsection (E) or (F) governs challenges to the WOTUS Rule. Pet. App. 29a (Griffin, J., concurring in judgment); see *id.* at 45a (Keith, J., dissenting). The Rule does not fit within the plain and unambiguous language of either subsection. The Rule defines a basic jurisdictional term used throughout the CWA; it does not approve or promulgate an effluent or other limitation under any of the specified provisions of the Act, or issue or deny any permit under the NPDES program. A plain reading of statutory text is enough to require reversal. And it is the only approach that produces a "[s]imple jurisdictional rule" that promotes "predictability" and under which courts "can readily assure themselves of their power to hear a case." *Hertz Corp.* v. *Friend*, 559 U.S. 77, 94 (2010).

Other considerations confirm that conclusion. Canons of statutory interpretation, statutory structure, legislative history, the principle that "jurisdictional rules should be clear" (*Lapides* v. *Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 621 (2002)), and the presumption that agency action is reviewable all contradict the agencies' position and support reversal. And contrary to the agencies' contention, this Court's decisions in *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977), and *Crown Simpson Pulp Co.* v. *Costle*, 445 U.S. 193 (1980), are readily distinguishable and in any event cast no doubt on that analysis.

This Court should reverse the judgment of the court of appeals and order dismissal of the petitions for review for want of jurisdiction.

B. The Clean Water Act

Congress enacted the Clean Water Act to eliminate "the discharge of pollutants into the navigable waters." 33 U.S.C. § 1251(a)(1). Section 1311(a) of the Act generally prohibits "the discharge of any pollutant by any person" without a permit. A "discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source," such as a pipe, ditch or other "confined and discrete conveyance." *Id.* § 1362(12), (14). "Navigable waters," in turn, are defined as "the waters of the United States." *Id.* § 1362(7).

Accordingly, whether a feature qualifies as a "water of the United States" is only one factor, along with other complex inquiries—such as whether an activity involves an "addition" of a "pollutant" from a "point source"—that determines whether a CWA permit is required for an activity. That determination depends too on whether exclusions to permitting requirements apply, such as those for certain water transfers,[3] stormwater discharges from most logging operations,[4] agricultural return flows,[5] certain discharges from mining, oil, or gas operations,[6] and others. By itself, determining that a feature is a "water of the United States" tells one nothing about how land may be used or whether an activity requires or qualifies for a permit; instead it leads to a further inquiry focused on other statutory and regulatory

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[3] See 40 C.F.R. § 122.3(i); *South Fla. Water Mgmt. Dist.* v. *Miccosukee Tribe*, 541 U.S. 95 (2004)

[4] See 40 C.F.R. § 122.26(a)(1)(ii), (b)(14)(ii); *Decker*, 133 S. Ct. 1326.

[5] See 33 U.S.C. § 1342(*l*)(1).

[6] See 33 U.S.C. § 1342(*l*)(2), § 1362(6)(b), (24).

factors that, together, determine what and how substantive rules apply.

The CWA permitting programs. The Act establishes two permitting programs to regulate discharges of pollutants into the waters of the United States. The NPDES program established in 33 U.S.C. § 1342 authorizes EPA to issue permits for discharges that do not involve fill material—generally, effluent discharges. An NPDES permit imposes effluent limits based on the technology available to treat the pollutants. It restricts "the quantities, rates, and concentrations of specified [pollutants] which are discharged from point sources." *Arkansas* v. *Oklahoma*, 503 U.S. 91, 101 (1992); see 33 U.S.C. §§ 1311(b)(1)(A)-(B), 1317(a), 1342(a)(3), (b)(1)(A).

Sometimes technology-based limits are insufficient to achieve water quality standards "promulgated by the States [to] establish the desired condition of a waterway." *Arkansas*, 503 U.S. at 101. In that event, permits also impose any more stringent limits or strategies necessary to achieve water quality standards. 33 U.S.C. §§ 1311(b)(1)(C), 1312(a). Most States administer the Section 1342 permit program within their own borders, as authorized under Section 1342(b).

Section 1344 establishes a separate permit program, administered by the Corps of Engineers, for "the discharge of dredged or fill material into the navigable waters." That program applies to discharges of "solids that do not readily wash downstream" (*Rapanos* v. *United States*, 547 U.S. 715, 723 (2006) (plurality)) and so "chang[e] the bottom elevation" of water. 40 C.F.R. § 232.2. In determining whether to issue a Section 1344 permit, the Corps applies criteria developed by both EPA and the Corps pursuant to

Section 1344(b)(1). EPA also has the authority to veto the specification of a site for discharge of fill material. 33 U.S.C. § 1344(c); see *Coeur Alaska, Inc.* v. *Southeast Alaska Conservation Council*, 557 U.S. 261, 266-269 (2009). Two States operate the Section 1344 program under Section 1344(g).

The CWA's jurisdictional terms define the geographic scope of the entire statute. The terms "navigable waters" and "waters of the United States" define the geographic reach of the Act's two permitting schemes, but also that of "the entire statute." *Rapanos*, 547 U.S. at 742. Those terms appear repeatedly throughout the 1972 Act and its later amendments to establish the geographic scope of regulatory programs and actions. For example:

- Section 1313(c)(2)(A) requires each State to establish water quality standards based on "the designated uses of the navigable waters" within its borders, subject to EPA oversight and EPA's authority to promulgate water quality standards if the State does not adequately do so. See 33 U.S.C. § 1313(c)(3).
- Section 1314(*l*) requires each State to identify "all navigable waters in such State" that cannot meet State water quality standards due to point-source discharges of toxic pollutants, and to develop "an individual control strategy" to address those discharges, which EPA must approve or reject and which EPA may promulgate itself if the State fails to do so. See 33 U.S.C. § 1314(*l*)(2), (3).
- Section 1329 requires each State to identify "navigable waters within the state" that cannot meet State water quality standards "without additional action to control nonpoint sources of

pollution," and to establish a program of best management practices and other measures for controlling such pollution, which EPA may approve, disapprove, modify, or implement itself if the State fails to do so. See 33 U.S.C. § 1329(d).

- Section 1252(a) requires the Administrator to "develop comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters * * *."
- Section 1256(e) conditions certain federal grants to the States on the adequacy of their monitoring of "the quality of navigable waters."
- Section 1288(b)(4) provides for State areawide waste treatment management plans to include best management practices to control discharges of "dredged or fill material which adversely affects navigable waters," in lieu of obtaining a Section 1344 permit.
- Section 1315(b) requires each State to provide regular, detailed reports to EPA on "the water quality of all navigable waters in such State."
- Section 1341(a)(1) conditions receipt of any federal license or permit for any activity "which may result in any discharge into the navigable waters" on obtaining "a certification from the State in which the discharge originates" that the discharge complies with specified requirements.

Accordingly, the term "waters of the United States" is one element, albeit an important one, of a reticulated statutory scheme with many components that work together. It defines the geographic reach of most of the CWA's requirements, but by itself requires no action. It imposes no obligation except when applied in conjunction with other, separate statutory concepts.

This Court has previously addressed the term "waters of the United States." This Court considered the meaning of the term "waters of the United States" in the CWA in three cases. In *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 135 (1985), this Court concluded that the agencies permissibly interpreted "waters of the United States" to encompass wetlands that abut traditional navigable waters. In *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"), it struck down the agencies' "Migratory Bird Rule," which purported to extend agency jurisdiction to any waters that are or might be used as habitat for migratory birds, no matter how isolated or remote from navigable waters. And in *Rapanos*, the Court reversed the agencies' determination that they had jurisdiction over wetlands that "lie near ditches or man-made drains that eventually empty into traditional navigable waters," which swept in "virtually any parcel of land containing a channel or conduit * * * through which rainwater or drainage may occasionally or intermittently flow." 547 U.S. at 722, 729 (plurality); see *id.* at 759 (Kennedy, J., concurring) (applying a "significant nexus" test).

C. The Waters of the United States Rule

The WOTUS Rule purports to define "waters of the United States" within the meaning of the CWA and *Rapanos*, *SWANCC*, and *Riverside Bayview*. 80 Fed. Reg. at 37,054. The agencies describe their WOTUS Rule as "a definitional rule that clarifies the scope of the Clean Water Act." 80 Fed. Reg. at 37,104. They say that it "does not establish any regulatory requirements." *Id.* at 37,054. And they claim it "imposes no enforceable duty on any state, local, or tribal governments, or the private sector." *Id.* at 37,102; see also EPA & Corps, *Economic Analysis of the*

EPA-Army Clean Water Rule 61 (May 2015) ("The final rule is not designed to 'subject' any entities of any size to any specific regulatory burden" but "to clarify the statutory scope of 'the waters of the United States'"); *id.* at vii ("This rule does not result in any direct costs or benefits * * *. A finding of jurisdiction regarding a particular water does not incur any direct costs").

The WOTUS Rule separates waters into three jurisdictional groups. In the first group are waters that are categorically jurisdictional: (1) traditional navigable waters, (2) interstate waters, (3) territorial seas, (4) impoundments of any water deemed to be a "water of the United States," (5) certain tributaries, and (6) certain waters that are "adjacent" to the foregoing five categories of waters. 33 C.F.R. § 328.3(a).

In the second group are waters "that require a case-specific significant nexus evaluation" to determine if they are jurisdictional. 80 Fed. Reg. at 37,073. Waters that are subject to jurisdiction based on a case-specific significant nexus determination include: (A) waters, any part of which are within the 100-year floodplain of a traditional navigable water, interstate water, or territorial sea; or (B) waters, any part of which are within 4,000 feet of the ordinary high water mark of any of those jurisdictional waters, any impoundment of those jurisdictional waters, or any covered tributary. 33 C.F.R. § 328.3(a)(8).

In the third group are waters excluded from jurisdiction. These include: swimming pools, puddles, ornamental waters, prior converted cropland, waste treatment systems, some drainage ditches, farm and stock watering ponds, settling basins, water-filled depressions incidental to mining or construction activity, subsurface drainage systems, and certain wastewater recycling structures. 33 C.F.R. § 328.3(b).

Petitioners challenging the WOTUS Rule have shown that it is deeply flawed both in substance and procedure and that the breadth and uncertainty of its definitions violate this Court's precedents and the Act. The Rule is arbitrary and capricious and not in accordance with law and consequently violates the APA, 5 U.S.C. § 706(2)(A)-(D). See Br. for the Business and Municipal Ptrs., *In re Clean Water Rule*, No. 15-3751 cons., Dkt. 129-1 (6th Cir. Nov. 1, 2016).[7] The merits of the Rule, however, are not at issue here. Merits litigation has been held in abeyance pending this Court's ruling on which court has jurisdiction.

The agencies issued a notice of proposed rulemaking announcing their "intention to review and rescind or revise" the WOTUS Rule. 82 Fed. Reg. 12497 (Mar. 3, 2017). This Court denied the agencies' motion to hold this case in abeyance pending that review. Order (Apr. 3, 2017).

D. Judicial Review Of The Rule

Scores of state, municipal, industry, and environmental plaintiffs filed suits challenging the WOTUS Rule in district courts. See *supra* p. v. The NAM filed suit, as part of a coalition of industry groups, in the Southern District of Texas. See *supra* n.1.

The Judicial Panel on Multidistrict Litigation denied the agencies' request to consolidate the district court actions and to transfer them to the District Court for the District of Columbia. See *In re Clean Water Rule*, MDL No. 2663, Dkt. 163 (JPML Oct. 13, 2015). The Judicial Panel held that transfer was inappropriate under 28 U.S.C. § 1407 because the complaints turn on issues of law and "different

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[7] Except where otherwise indicated, docket references throughout this brief ("Dkt.") are to this Sixth Circuit docket.

jurisdictional rulings by the involved courts" counseled against consolidation. *Id.* at 2.

Reflecting the uncertainty surrounding the scope of Section 1369(b) and the exclusivity of its grant of jurisdiction, many plaintiffs who filed district court actions (but not petitioner the NAM) also filed "protective" petitions for review in various courts of appeals, as courts have acknowledged is appropriate. *E.g.*, *Inv. Co. Inst.* v. *Bd. of Governors of Fed. Reserve Sys.*, 551 F.2d 1270, 1280 (D.C. Cir. 1977) ("If any doubt as to the proper forum exists, careful counsel should file suit in both the court of appeals and the district court"); *Roll Coater, Inc.* v. *Reilly*, 932 F.2d 668, 671 (7th Cir. 1991) ("careful counsel must respond to the combination of uncertain opportunities for review and § [1369(b)(2)] by filing buckshot petitions"). Those petitions were consolidated and transferred to the Sixth Circuit pursuant to 28 U.S.C. § 2112(a). Cons. Order, MCP No. 135 (JPML July 28, 2015).[8]

The agencies moved to stay or dismiss cases in the district courts in favor of the circuit court litigation. Some district courts held that the Sixth Circuit had exclusive jurisdiction. *E.g.*, *Murray Energy Corp.* v. *EPA*, 2015 WL 5062506 (N.D. W. Va. Aug. 26, 2015); *Georgia* v. *McCarthy*, 2015 WL 5092568 (S.D. Ga. Aug. 27, 2015), case stayed on appeal, 833 F.3d 1317 (11th Cir. 2016). The District Court for the District of North Dakota, by contrast, held it had jurisdiction. *North Dakota* v. *EPA*, 127 F. Supp. 3d 1047, 1053 (D.N.D. 2015) ("If the exceptionally expansive view" of Section 1369(b) "advocated by the government is adopted, it would encompass virtually all EPA actions under the

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[8] The 22 petitions for review and more than 100 petitioners are identified *supra* pp. ii-v.

Clean Water Act"); *id.*, 3:15-cv-59, Dkt. 156 (D.N.D. May 24, 2016) (staying case "pending further decision by the Courts of Appeals or Supreme Court").

E. The Sixth Circuit's Decision

The NAM successfully moved to intervene as a respondent in the Sixth Circuit. Dkt. 8 (Sept. 16, 2015). It then moved to dismiss the petitions for want of jurisdiction (Dkt. 39 (Oct. 2, 2015)), as did many parties that had filed protective petitions or intervened.

The Sixth Circuit concluded, in a fractured 1-1-1 decision, that it and not the district courts had jurisdiction to hear the rule challenges. The panel agreed that Subsections (E) and (F) were the "only two provisions of § 1369(b)(1)" that "potentially apply" (Pet. App. 8a), but otherwise splintered.

Judge McKeague's opinion. Judge McKeague recognized that the agencies' textual arguments as to Subsection (E) were "not compelling." Pet. App. 9a. "[T]he Rule's clarified definition," he wrote, does not "approve or promulgate *any* limitation that imposes *ipso facto* any restriction or requirement on point source operators or permit issuers." *Ibid.* (emphasis added). "Rather," it is "a definitional rule that, operating in conjunction with other regulations, will result in imposition of such limitations." *Ibid.*

Judge McKeague nevertheless concluded that jurisdiction lies in the court of appeals under Subsection (E), citing this Court's decision in *E.I. du Pont de Nemours & Co.* v. *Train*, *supra*. He believed that *du Pont* "eschewed" a "literal reading" of Section 1369(b)(1) in favor of a "more generou[s]" interpretation that "further[ed] Congress's evident purposes." Pet. App. 10a, 13a, 26a. Judge McKeague believed this interpretation encompasses the WOTUS Rule because

the Rule's "practical effect will be to *indirectly* produce various limitations on point-source operators and permit issuing authorities." *Id.* at 17a.

Turning to Subsection (F), Judge McKeague recognized that the Rule does not "issue" or "deny" any permits, but declined to give the provision "a strict literal application." Pet. App. 17a. He pointed to this Court's opinion in *Crown Simpson Pulp Co.* v. *Costle*, *supra*, and the Sixth Circuit's decision in *National Cotton Council of America* v. *EPA*, 553 F.3d 927 (6th Cir. 2009), as supporting direct review in the circuit courts of any regulation that "*affects* permitting requirements." Pet. App. 19a (emphasis added).

Judge Griffin's concurrence. Judge Griffin concurred in the judgment only. He concluded that the Sixth Circuit lacked jurisdiction under the "plain text" of Subsection (E) because the Rule is not an "effluent limitation or other limitation," and also "does not emanate from" Sections 1311, 1312, 1316, or 1345, but "is a phrase used in the Act's definitional section, § 1362," which "is not mentioned in § 1369." Pet. App. 30a-31a. He read *du Pont* to authorize review under Subsection (E) of EPA regulations that "'promulgate effluent limitations,'" no more. *Id.* at 34a.

Judge Griffin further concluded that "[o]n its face, subsection (F) clearly does not apply" because the Rule "neither issues nor denies a permit under the NPDES." Pet. App. 39a. But he concurred in the judgment because, in his view, the Sixth Circuit's earlier (and "incorrect") decision in "*National Cotton* dictates [the] conclusion" that Subsection (F) encompasses the WOTUS Rule. *Id.* at 42a, 44a. Judge Griffin nevertheless criticized that conclusion because it means that Subsection (F)'s "jurisdictional reach" has

"no end," catching "*anything* relating to permitting." *Id.* at 42a.

Judge Keith's dissent. Judge Keith dissented. He joined Judge Griffin in holding Subsection (E) inapplicable on its face. Pet. App. 45a. Turning to Subsection (F), he refused to read *National Cotton* to authorize original jurisdiction over "all rules '*relating*' to [permitting] procedures, such as the one at issue here," which "merely defines the scope of the term 'waters of the United States.'" *Id.* at 46a.

The Sixth Circuit denied rehearing. Pet. App. 51a-52a. It held merits briefing in abeyance after this Court granted certiorari. Dkt. 171-2 (Jan. 25, 2017).

SUMMARY OF THE ARGUMENT

I. The Sixth Circuit's erroneous exercise of jurisdiction under Section 1369(b) violates the statute's plain language and structure.

A. Contrary to the Sixth Circuit's ruling, it lacks jurisdiction under Section 1369(b)(1)(F). It is undisputed that the WOTUS Rule does *not* "issu[e] or den[y] any permit under section 1342." It therefore lies outside Subsection (F)'s unambiguous text. That fact should end the analysis.

In stretching Subsection (F) to reach all EPA actions that *affect* the granting or denying of Section 1342 permits, Judge McKeague misread this Court's decision in *Crown Simpson Pulp Co.* v. *Costle*, *supra*, which did involve EPA's denial of a permit. His rewriting of Subsection (F) would cover most agency action under the CWA and render superfluous Subsections (A), (C), (D), (E), and (G) of Section 1369(b)(1).

B. A majority of the panel correctly determined that Section 1369(b)(1)(E) does not confer jurisdiction

on the court of appeals. The Rule falls outside Subsection (E)'s plain language because it is not a "limitation," it is not an "other limitation" within the meaning of Subsection (E), and it was not issued "under section 1311." To the contrary, the Rule addresses a phrase in Section 1362(7) that defines the geographic scope of the Act as a whole and thus impacts dozens of CWA provisions just as or more directly than Section 1311. And it limits no action: any limitation arises only when multiple additional statutory terms, like "addition," "pollutant," and "point source," also apply, and when exclusions from permitting requirements are ruled out.

In eschewing a literal reading, Judge McKeague misinterpreted Subsection (E) to extend to any EPA action that merely affects point source operators or permit issuers. In doing so he misread this Court's decision in *E.I. du Pont de Nemours & Co.* v. *Train*, *supra*, which involved industry-wide effluent limitations issued under Section 1311. His analysis has no stopping point, conflicts with this Court's recent holdings, and would render other provisions redundant.

C. Section 1369(b)'s structure confirms the Sixth Circuit's lack of jurisdiction. Congress enacted seven narrow bases for original jurisdiction in the courts of appeals. Its specific focus shows that Congress did not intend Section 1369(b) to provide courts of appeals with original jurisdiction to review all nationwide rule-making under the CWA. Congress's markedly different language in the Clean Air Act's judicial review provisions reinforces this conclusion. There, Congress granted courts of appeals jurisdiction to review all nationally, regionally, or locally applicable regulations. Congress's omission of similarly broad language from the CWA must be given meaning.

D. Legislative history bolsters this conclusion. Although there is scant legislative history surrounding the enactment of Section 1369(b) in 1972, in 1977, Senator Kennedy attempted, with EPA support, to expand Section 1369(b) to cover nationwide rulemaking. He was unsuccessful, yet that same Congress expanded the Clean Air Act's direct judicial-review provisions to include nationwide rulemaking. The negative implication raised by Congress's disparate actions is compelling.

II. Because Section 1369(b)'s plain language resolves this case, there is no need to consider the policy implications of Congress's allocation of jurisdiction. There are, nevertheless, strong policy reasons that support Congress's choice.

A. This Court has emphasized that jurisdictional rules must be clear and administrable. Reading Section 1369(b) textually produces a straightforward jurisdictional standard. Judge McKeague's approach, by contrast, fosters uncertainty over jurisdiction that leads to wasteful litigation. By limiting Section 1369(b) to its text, this Court can put an end to the wasteful practice of duplicative district court and circuit court challenges to agency action under the CWA.

B. Section 1369(b)'s preclusion provision compels a narrow interpretation of the statute. Section 1369(b)(2) prohibits parties in criminal and civil enforcement proceedings from challenging agency action that could have been reviewed under Section 1369(b)(1). A broad interpretation of Section 1369(b)(1) exacerbates the CWA's crushing penalties and creates due process concerns by foreclosing judicial review of unlawful agency action. A broad reading also increases Section 1369(b)(2)'s perverse incentive for parties to petition

for review of all agency action that conceivably falls within Section 1369(b)(1).

C. A plain-language reading of Section 1369(b) allows district courts and multiple courts of appeals to review agency action and thereby improves the quality of judicial decision-making. Disagreement among lower courts increases the probability of correct decisions. And having multiple courts review agency action will ensure full percolation of issues in the lower courts and improve this Court's ability to decide which cases to review. There is no reason to think that multi-court review is less appropriate for agency action than for other cases, such as those involving the meaning or constitutionality of federal statutes.

D. Judge McKeague greatly overstated efficiency gains under his atextual reading of Section 1369(b). Whether review lies under Section 1369(b) or the APA, challenges to important agency action typically will be filed quickly. And parties often coordinate their rule challenges to avoid duplicative litigation. District courts are efficient in reviewing agency action and adept at finding any facts relevant to such review. In any event, efficiency concerns cannot override the plain language of Section 1369(b). This Court should reverse the Sixth Circuit's judgment and remand with instructions to dismiss for lack of jurisdiction.

ARGUMENT

The Sixth Circuit erred in ruling that it had jurisdiction under Section 1369(b). "Section 1369(b) extends only to certain suits challenging some agency actions," which the provision clearly identifies. *Decker*, 133 S. Ct. at 1334. It does not extend to suits challenging the WOTUS Rule.

I. The Sixth Circuit Lacks Jurisdiction Under The Plain Language Of Section 1369(b).

"A statute affecting federal jurisdiction 'must be construed both with precision and with fidelity to the terms by which Congress has expressed its wishes.'" *Kucana* v. *Holder*, 558 U.S. 233, 252 (2010). That simple principle resolves this case. As Judges Griffin and Keith explained, the Sixth Circuit lacks jurisdiction under the unambiguous language of Subsections 1369(b)(1)(E) and (F). See Pet. App. 29a (Griffin, J.) ("it is illogical and unreasonable to read the text of either subsection (E) or (F) as creating jurisdiction in the courts of appeals"), 45a (Keith, J.) ("under the plain meaning of the statute, neither subsection (E) nor (F) * * * confers original jurisdiction on the appellate courts"). The Sixth Circuit should have dismissed the petitions for lack of jurisdiction.

A. The Sixth Circuit Erroneously Exercised Jurisdiction Under Section 1369(b)(1)(F).

We begin with Section 1369(b)(1)(F), under which the Sixth Circuit took jurisdiction. Subsection (F) grants courts of appeals original jurisdiction to review "the Administrator's action * * * in issuing or denying any permit under section 1342." As a matter of plain statutory language and precedent, the Sixth Circuit lacks jurisdiction under Subsection (F).

1. The WOTUS Rule Falls Outside The Unambiguous Language Of Subsection (F).

The WOTUS Rule is *not* an EPA action "issuing or denying any permit under section 1342." Permits under Section 1342 "authoriz[e] the discharge of pollutants" into jurisdictional waters "in accordance with specified conditions." *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 52 (1987).

Section 1342 permits contain "five general types of provisions: technology-based effluent limitations, water-quality-based effluent limitations, monitoring and reporting requirements, standard conditions, and special conditions." THE CLEAN WATER ACT HANDBOOK 33 (Mark A. Ryan ed., 3d ed. 2011). They are enforceable by administrative actions and citizen suits. 33 U.S.C. §§ 1319, 1365.

There are plenty of examples in which EPA *actually* issues or denies a permit under Section 1342; those EPA actions may be directly reviewed by the courts of appeals.[9]

Here, however, it is *undisputed* that the WOTUS Rule does not issue or deny a Section 1342 permit. The panel was unanimous on this point. Judge Griffin observed that the WOTUS Rule "neither issues nor denies a permit" and thus, "[o]n its face, subsection (F) clearly does not apply." Pet. App. 39a. Judge Keith agreed, writing that the Sixth Circuit lacks jurisdiction "under the plain meaning" of Subsection (F). *Id.* at 45a. Even Judge McKeague conceded the point, admitting that our reading is "consonant with the plain language" of Subsection (F). *Id.* at 23a-24a.

The agencies have never claimed that the WOTUS Rule issues or denies a Section 1342 permit. EPA's then-Administrator Gina McCarthy admitted that the Rule does not do so: "[T]he Clean Water Rule is a

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[9] See, *e.g.*, *Nat. Res. Def. Council* v. *EPA*, 808 F.3d 556, 562 & n.4 (2d Cir. 2015) (challenging grant of Section 1342 permit to vessels); *Alaska Eskimo Whaling Comm'n* v. *EPA*, 791 F.3d 1088, 1090-1091 (9th Cir. 2015) (challenging grant of Section 1342 permit to oil and gas exploration facilities); *Upper Blackstone Water Pollution Abatement Dist.* v. *EPA*, 690 F.3d 9, 11, 20 (1st Cir. 2012) (challenging grant of Section 1342 permit to sewage treatment plant).

jurisdictional rule. It doesn't result in automatic permit decisions." *The Fiscal Year 2016 EPA Budget: Joint Hearing Before the Subcomm. on Energy & Power & the Subcomm. on Environment & Economy of the House Comm. on Energy & Commerce*, 114th Cong. 70 (Feb. 25, 2015).

The fact that the WOTUS Rule does not issue or deny permits "should end the analysis." Pet. App. 39a (Griffin, J.). Statutory interpretation "begins 'with the language of the statute itself,' and that 'is also where the inquiry should end,' for 'the statute's language is plain.'" *Puerto Rico* v. *Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016); accord *Jimenez* v. *Quarterman*, 555 U.S. 113, 118 (2009) ("when the statutory language is plain, we must enforce it according to its terms"). Because the WOTUS Rule is not an EPA action "issuing or denying any permit under section 1342," jurisdiction is lacking under Section 1369(b)(1)(F).

2. Subsection (F) Does Not Extend To EPA Actions That Merely Affect The Issuing Or Denying Of Permits.

a. Despite conceding a lack of textual support, Judge McKeague interpreted Section 1369(b)(1)(F) to encompass any EPA action that "*impacts* the granting and denying of permits." Pet. App. 21a (emphasis added). He believed that this Court's decision in *Crown Simpson Pulp Co.* v. *Costle* "opened the door to constructions other than a strict literal application" and had allowed "the scope of direct circuit court review [to] gradually expan[d]" over the decades. *Id.* at 17a, 26a. Judge McKeague misread *Crown Simpson*.

In *Crown Simpson*, EPA vetoed Section 1342 permits that a California agency had issued to pulp mills in Eureka, California after EPA had delegated

permitting authority to the State. 445 U.S. at 194-195 & n.3. This Court held that the Ninth Circuit had jurisdiction under Section 1369(b)(1)(F) to review the mills' challenges to EPA's vetoes because the vetoes were "functionally similar to [EPA's] denial of a permit in States which do not administer an approved permit-issuing program" and *had "the precise effect" of denying the permits*. *Id.* at 196 (emphasis added). The Court explained that the CWA did not create "a seemingly irrational bifurcated system" in which "denials of NPDES permits would be reviewable at different levels of the federal-court system depending on the fortuitous circumstance of whether the State in which the case arose was or was not authorized to issue permits." *Id.* at 196-197.

EPA has successfully argued in other cases that *Crown Simpson* was superseded by the 1977 amendments to the CWA.[10] Regardless, "'[t]he facts of [*Crown Simpson*] make clear that the Court understood functional similarity in a narrow sense.'" Pet. App. 40a (Griffin, J.) (quoting *Nw. Envtl. Advocates* v. *EPA*, 537 F.3d 1006, 1016 (9th Cir. 2008)).

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[10] The 1977 amendments gave EPA the power to issue Section 1342 permits directly when States failed to revise State-proposed permits to meet EPA's objections. See *Crown Simpson*, 445 U.S. at 194 n.2. The challenge in *Crown Simpson* preceded the amendments, the impact of which this Court expressly "d[id] not consider." *Ibid.* Courts of appeals have since agreed with EPA that the 1977 amendments supersede *Crown Simpson*'s holding. As the Seventh Circuit explained in *Am. Paper Inst., Inc.* v. *EPA*, 890 F.2d 869, 874 (7th Cir. 1989), the amendments "fundamentally altered the underpinnings of" *Crown Simpson*. "Under the old system, an EPA objection effectively denied a permit." *Ibid.* The 1977 amendments "allow[ed] the EPA to issue a permit" on revised terms "if the state refuses to modify its proposed permit," so that "an EPA objection to a proposed state permit is no longer 'functionally similar' to denying a permit." *Ibid.*

In *Crown Simpson*, EPA *denied* Section 1342 permits: EPA decided that specific permits proposed by a state agency would not issue.

Crown Simpson thus merely held that EPA's veto of a state-issued permit is the denial of a Section 1342 permit covered by Subsection (F). That unexceptional ruling cannot plausibly be read to authorize a vast expansion of Subsection (F) to "apply to any 'regulations relating to permitting'" (Pet. App. 43a), as Judge McKeague held here. Pet. App. 18a-24a.

Unlike the permit veto at issue in *Crown Simpson*, the WOTUS Rule does not deny permits. The Rule instead purports to define one aspect of the scope of the CWA—its geographical reach. Nothing in *Crown Simpson* suggests that a jurisdictional rule affecting one factor that goes into a determination whether permits are or are not required—along with other factors such as whether there is an "addition" of a "pollutant" from a "point source," or whether any statutory or regulatory exclusion from the permitting requirement applies—is itself a permit denial or issuance covered by Subsection (F).

Reading *Crown Simpson* expansively, as the Eleventh Circuit concluded, "is contrary to the statutory text." *Friends of the Everglades* v. *EPA*, 699 F.3d 1280, 1288 (11th Cir. 2012). Congress could have written Subsection (F) to apply to any EPA action "relating to permitting" or "affecting when permits may be required under Section 1342." Its failure to "'adopt [that] readily available and apparent alternative strongly supports' the conclusion" that Section 1369(b) does not authorize such broad court of appeals jurisdiction. *NLRB* v. *SW Gen., Inc.*, 137 S. Ct. 929, 939 (2017).

b. As Judges Griffin and Keith recognized, it is difficult to imagine any case in which Judge McKeague's expansive rewriting of Subsection (F) would not confer jurisdiction. See Pet. App. 42a (Griffin, J.) (Subsection (F)'s "jurisdictional reach" would have "no end"); *id.* at 47a (Keith, J.) (ruling "expands the jurisdictional reach of subsection (F) in an all-encompassing, limitless fashion").

Most provisions of the CWA have some impact on permitting. Definitions of "pollutant," "person," and "point source," the term "addition," lists of toxic pollutants or new sources, rules about best management practices, definitions of various exclusions to permitting requirements, and countless other regulatory pronouncements would be encompassed by an "*impacts*-the-granting-or-denying-of-permits" test for Subsection (F) jurisdiction. Any EPA action regarding any of those provisions concerns either the scope of permitting authority or the terms on which permits are issued.

If Subsection (F) were expanded beyond the issuance or denial of NPDES permits to cover any EPA action affecting permitting, the "foreseeable consequence" would be that the courts of appeals "would exercise original subject-matter jurisdiction over all things related to the Clean Water Act." Pet. App. 47a (Keith, J.). That "exceptionally expansive view" is "precisely contrary to Section 1369(b)(1)(F)'s grant of jurisdiction." *North Dakota*, 127 F. Supp. 3d at 1051.

c. Because most other CWA provisions relate in some way to permit issuance or denial, Judge McKeague's interpretation also "run[s] headlong into the rule against superfluity." *Lockhart* v. *United States*, 136 S. Ct. 958, 966 (2016). Under his approach,

most of the other designations Congress made in Section 1369(b) would be unnecessary because they would be covered by Subsection (F).

Section 1369(b)(1)(D), for example, grants the courts of appeals jurisdiction to review EPA actions "in making any determination as to a State permit program submitted under section 1342(b)." By its very nature, EPA's determination about the authority of a State to run the NPDES permitting program will "impact the granting and denying of permits" (Pet. App. 21a) and thus satisfy Judge McKeague's standard. If that impact were enough to trigger jurisdiction under Section 1369(b)(1)(F), there would be no need for Section 1369(b)(1)(D).

Other superfluities abound. The "standards of performance," "pretreatment standards" and "effluent limitations" referred to in Subsections (A), (C) and (E) are *incorporated* into, and therefore plainly "impac[t] the granting and denying of," Section 1342 permits. Pet. App. 21a. Satisfying Section 1316's new source performance standards, referenced in Section 1369(b)(1)(A), is a condition of any NPDES permit. 40 C.F.R. § 401.12(i). "[T]he requirements to develop and implement a [Publicly Owned Treatment Works] pretreatment program" under Section 1317, referenced in Section 1369(b)(1)(C), likewise "are included as enforceable conditions in the POTW's NPDES permit." EPA, PERMIT WRITER'S GUIDE at 9-10 (Sept. 2010).[11] "Effluent standards" and "limitations" referred to in Subsections (C) and (E) likewise are written into permits. *Id.* at 5-1 ("NPDES permit writers [are required] to develop technology-based treatment

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[11] https://www.epa.gov/sites/production/files/2015-09/documents/pwm_chapt_09.pdf.

requirements, consistent with CWA section [1311(b)], that represent the minimum level of control that must be imposed in a permit. * * * [P]ermit writers [also] must include in permits additional or more stringent effluent limitations and conditions, including those necessary to protect water quality").[12]

As if that were not enough, the State-developed "individual control strategies" for toxic pollutants that EPA approves or disapproves pursuant to Section 1314(*l*)—referred to in Section 1369(b)(1)(G)—also are integrated into NPDES permits. Indeed, EPA regulations specify that "the term individual control strategy, as set forth in section [1314(*l*)] of the CWA, *means* a final NPDES permit with supporting documentation" showing "that applicable water quality standards will be met * * *." 40 C.F.R. § 123.46(c) (emphasis added).

Accordingly, if Subsection (F) covers all EPA action that impacts permitting, Subsections (A), (C), (E) and (G) are unnecessary because they each concern EPA action on requirements that become NPDES permit conditions. Judge McKeague's interpretation flatly violates the principle that "a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous." *Clark* v. *Rameker*, 134 S. Ct. 2242, 2248 (2014). This Court should "avoid" an interpretation that "makes a mess of" Section 1369(b) in this way. *SW Gen.*, 137 S. Ct. at 941.[13]

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[12] https://www.epa.gov/sites/production/files/2015-09/documents/pwm_chapt_05.pdf

[13] Section 1369(b)(1)(B) is not included in our list of subsections rendered superfluous by an "affects permitting" test because the CWA provision referred to there, 33 U.S.C. § 1316(b)(1)(C), never became law. That provision would have given EPA authority to

This Court should hold that the Sixth Circuit erred in exercising jurisdiction under Section 1369(b)(1)(F).

B. The Sixth Circuit Correctly Held That It Lacks Jurisdiction Under Subsection (E).

The Sixth Circuit correctly concluded that Section 1369(b)(1)(E) does not confer jurisdiction. The agencies nonetheless invoke Subsection (E) as an alternative ground for affirmance. Fed. BIO 11. They misread that provision.

1. The WOTUS Rule Falls Outside The Plain Language Of Subsection (E).

Subsection (E) grants jurisdiction to courts of appeals to review "the Administrator's action" in "approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345." It is undisputed that the WOTUS Rule is *not* an "effluent limitation," which is a "restriction * * * on quantities, rates, and concentrations" of pollutants discharged into navigable waters. 33 U.S.C. § 1362(11); see Pet. App. 8a-9a. It also is undisputed that the Rule was *not* issued under Sections 1312, 1316, or 1345. 80 Fed. Reg. at 37,055; Fed. BIO 13-14. The agencies' sole argument has been that the WOTUS Rule is an "other limitation under section 1311." Gov't Opp. to Mots. to Dismiss 15, Dkt. 58 (Oct. 23, 2015). That argument fails under the "plain and unambiguous text" of Subsection (E). Pet. App. 33a (Griffin, J.).

a. The WOTUS Rule is not a "limitation" in any ordinary sense of the word. Limitation is most naturally defined in Section 1369(b)(1)(E) to mean "a

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make a determination exempting sources from new source standards of performance, and thus would have impacted permitting had it been adopted. It was "eliminated," however, before enactment. S. Conf. Rep. 92-1236, at 3805 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3776.

restriction or restraint imposed" by EPA. Webster's Third New International Dictionary 1312 (1971); accord *Friends of the Everglades*, 699 F.3d at 1286 ("Black's Law Dictionary defines a 'limitation' as a 'restriction'"). That definition does not capture the WOTUS Rule. The agencies admitted in promulgating the Rule that it "does not establish any regulatory requirements" and "imposes no enforceable duty" on "the private sector." 80 Fed. Reg. at 37,054, 37,102. It "is definitional only and does not *directly* impose any restriction or limitation." Pet. App. 15a (McKeague, J.); see 80 Fed. Reg. at 37,104 (it is "a definitional rule that clarifies the scope of the Clean Water Act").

The Rule also "is not self-executing." Pet. App. 31a (Griffin, J.). It "operates in conjunction with other sections scattered throughout the Act to define when [the Act's other] restrictions * * * apply." *Ibid.*; accord *id.* at 9a (McKeague, J.) (only "operating in conjunction with other regulations [will the Rule] result in imposition of such limitations").

Furthermore, Judge Griffin recognized, the Rule "is not a 'limitation' on the discharge of pollutants *into* waters of the United States; rather, it sets the jurisdictional reach for whether the discharge limitations even apply in the first place." Pet. App. 32a. It would be "circular" to read a rule establishing the Act's geographical boundaries as a "'limitatio[n]' under" the Act. *Ibid.*

b. The Rule also is not an "other limitation" within the meaning of Subsection (E). Congress's use of the phrase "any effluent limitation or other limitation" makes clear that it intended "other limitation" to have a similar meaning to "effluent limitation." That is true under the *ejusdem generis* canon, which reads a general term following a specific term as "embrac[ing]

only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 114-115 (2001). It is equally true under the *noscitur a sociis* canon, which "avoid[s] ascribing to one word a meaning so broad that it is inconsistent with its accompanying words." *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 575 (1995). Both canons reflect the common-sense notion that Congress would not have said "any effluent limitation or other limitation" if what it meant was "any limitation." A contrary reading would render "superfluous" the "specific word[s]" *effluent limitation*. Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 206 (2012). The Seventh Circuit thus got it right when it "interpret[ed] the 'other limitation' language of subsection 1369(b)(1)(E) as restricted to limitations directly related to effluent limitations." *Am. Paper Inst., Inc.* v. *EPA*, 890 F.2d 869, 877 (7th Cir. 1989).

Effluent limitations "dictate in specific and technical terms the amount of each pollutant that a point source may emit." *Am. Paper Inst.*, 890 F.2d at 876. Other limitations like effluent limitations include, for example, non-numerical operational practices or equipment specifications. See *infra* p. 31. But the Rule, a regulatory definition of "waters of the United States," is not remotely similar in nature to an effluent limitation.

The WOTUS Rule is not an "other limitation" for a second reason. As Judge Griffin explained, "the 'limitations' set forth in §§ 1311, 1312, 1316, and 1345 provide the boundaries for what constitutes an effluent or other limitation." Pet. App. 30a. Each of those sections addresses effluent limitations or effluent limitation-like rules. Section 1311 governs "effluent limitations." Section 1312 governs "water quality related

effluent limitations," which are additional effluent limitations that may be imposed where other limitations fail to achieve water quality standards. Section 1316 governs effluent controls for new sources of discharges. And Section 1345 restricts the discharge of sewage sludge. Confirming that these are all effluent limitations or similar to them, all are incorporated into NPDES permits. See 40 C.F.R. § 401.12(i) (permits are conditioned on satisfying requirements of Sections 1311, 1312, and 1316); NPDES PERMIT WRITER'S MANUAL 9-1 (Sept. 2010) ("special conditions" in permits include "NPDES programmatic requirements" such as those concerning "sewage sludge" under Section 1345).

And there are "other limitations" within these sections—limitations that the statute does not describe as "effluent limitations." Section 1311(b)(1)(C) allows EPA to issue "any more stringent limitation[s]" if technology-based effluent limitations cannot "meet water quality standards, treatment standards, or schedules of compliance." Section 1316(a)(1) permits EPA to use "alternatives" to achieve effluent reductions for new sources if "control technology, processes, [and] operating methods" are insufficient. Section 1345(d)(3) provides that, if "it is not feasible to prescribe or enforce a numerical limitation" on pollutants in sewage sludge, EPA may "promulgate a design, equipment, management practice, or operational standard."

Using "other limitation[s]," EPA may issue "highly specific and detailed provisions that direc[t] the point sources to engage in specific types of activity." *Am. Paper Inst.*, 890 F.2d at 877. But those "limitations" are nothing like the WOTUS Rule, which attempts to define where the CWA does and does not apply.

c. The WOTUS Rule does not properly fall "under section 1311." Section 1311, titled "Effluent limitations," sets standards for effluent and other limitations on many subjects, including existing point sources; publicly owned treatment works; toxic pollutants; radiological, chemical, or biological warfare agents; and innovative technologies. This Court held in *du Pont* that Section 1311 "unambiguously provides" EPA with authority to establish "effluent limitations." 430 U.S. at 127. Because Section 1311 plainly "authorizes EPA to issue effluent limitations, the reference in section [1369](b)(1)(E)" to Section 1311 "is readily understandable." *Bethlehem Steel Corp.* v. *EPA*, 538 F.2d 513, 516 (2d Cir. 1976).

The WOTUS Rule falls outside that readily understandable reference. The phrase "waters of the United States" does not appear in Section 1311. "It is a phrase used in the Act's definitional section, § 1362." Pet. App. 31a (Griffin, J.). Judge Griffin thus reached the unassailable conclusion that WOTUS Rule "does not emanate from" Section 1311. *Ibid.*

Indeed, it is inconceivable that Congress intended a regulatory definition of one phrase in Section 1362 to constitute an EPA action "under section 1311." It takes multiple steps to get from Section 1311 to the phrase "waters of the United States." Section 1311(a) provides that, "[e]xcept as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful." Section 1362(12), in turn, defines the phrase "discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source." Next, Section 1362(7) states that "[t]he term 'navigable waters' means the waters of the United States, including the territorial seas." The WOTUS Rule defines a portion of that last sentence, and but

one factor among many that feeds into the Section 1311(a) prohibition.

If that chain of references were enough to make the WOTUS Rule an "other limitation" "under" Section 1311(a), then any regulation addressing the other key terms that appear in Section 1311(a)—"discharge," "pollutant," and "person"—would equally be an "other limitation." And so would EPA action addressing the meaning of the concepts used in Section 1362 in defining those terms. See 33 U.S.C. § 1362(5) (defining "person"); § 1362(6) (defining "pollutant"); § 1362(12) (defining "discharge" as an "addition of any pollutant to navigable waters from any point source"); § 1362(14) (defining "point source").

For example, EPA's Water Transfers Rule, 40 C.F.R. § 122.3(i), clarifies that a water transfer that "conveys or connects waters of the United States" does not involve an "addition" of pollutants to navigable waters and so is not a "discharge" that requires a permit, unless the transfer "subject[s] the transferred water to intervening industrial, municipal, or commercial use." The Eleventh Circuit held that the Water Transfers Rule is not an "other limitation" covered by Section 1369(b)(1)(E) and dismissed petitions for review for want of jurisdiction. *Friends of the Everglades*, 699 F.3d 1280. Challenges to the rule were then litigated in district court in New York. *Catskill Mountains Chapter of Trout Unlimited* v. *EPA*, 8 F. Supp. 3d 500 (S.D.N.Y. 2014), *rev'd*, 846 F.3d 492 (2d Cir. 2017). Under the agencies' theory, that case was litigated in the wrong court: any rule defining what is and is not an "addition" or "discharge" is a limitation under Section 1311 because it governs the meaning of terms central to that provision. The breathtaking scope of that expansion would surely shock the drafters of Section 1369(b). Definitions of the

many individual constituent elements directly or indirectly referred to in Section 1311 are not plausibly "limitations" "under" that provision.

d. Finally, the WOTUS Rule is not an "other limitation under section 1311, 1312, 1316, or 1345" because it is a definitional rule that "applies across the entire Act." Pet. App. 41a (Griffin, J.); see *Rapanos*, 547 U.S. at 742 ("the same definition of 'navigable waters' applies to the entire statute") (plurality).

The phrases "waters of the United States" and "navigable water" are used throughout the CWA. And they have no special relationship to the sections identified in Subsection (E). See *supra* pp. 8-9 (listing examples). "Waters of the United States" does *not* appear in Section 1311, but it is used in Sections 1272, 1293a, 1321, 1322, and 1342. And while Section 1311(a) does *not* contain the term "navigable waters," that term is used in Sections 1251, 1252, 1256, 1272, 1288, 1293a, 1312, 1313, 1314, 1315, 1321, 1322, 1329, 1341, 1342, 1344, 1345, and 1371. The phrase "discharge of any pollutant" in Section 1311(a) appears, with slight variants, in Sections 1251, 1254, 1255, 1281, 1312, 1314, 1315, 1316, 1317, 1342, 1344, 1364, 1370, 1371, and 1375. Thus, the WOTUS Rule affects dozens of CWA provisions *as or more directly* than it affects Section 1311(a).[14]

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[14] For all these reasons, it is immaterial that the agencies cited Section 1311 among the provisions under which they purported to have issued the Rule. 80 Fed. Reg. at 37,055 (asserting that "[t]he authority for this rule is the [CWA]" *in its entirety*, "including" Sections 1311, 1314, 1321, 1341, 1342, 1344, and 1361); cf. *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 283 (1978) ("[Congress] did not empower the [EPA] Administrator, after the manner of Humpty Dumpty in Through the Looking-Glass, to make a regulation an 'emission standard' by his mere designation").

Congress could have listed Section 1362(7) within Section 1369(b)'s grant of jurisdiction to the courts of appeals—an omission that "counsels heavily against a finding of jurisdiction." Pet. App. 31a (Griffin, J.). Or Congress could have said that any EPA action "directly or indirectly affecting section 1311" is reviewable in the courts of appeals—in which case *all* EPA actions likely would be reviewable by the courts of appeals. But the language that Congress actually used—EPA actions "in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345"—does not extend to a regulation that defines a phrase in Section 1362(7) which underlies the entire Act and imposes no limitation unless a slew of other statutory and regulatory provisions also apply. The Sixth Circuit correctly held that it lacks jurisdiction under Section 1369(b)(1)(E).

2. *Subsection (E) Does Not Extend To EPA Actions That Merely Impact Point Source Operators Or Regulators.*

a. In casting the sole vote to exercise jurisdiction under Section 1369(b)(1)(E), Judge McKeague construed that provision "not in a strict literal sense," but instead to cover any EPA action "whose practical effect will be to *indirectly* produce various limitations on point-source operators and permit issuing authorities." Pet. App. 17a, 26a. Judge McKeague claimed support for this atextual interpretation in this Court's *du Pont* decision, which he said "eschewed a strict, literal reading" and granted courts "a license to construe Congress's purposes in § 1369(b)(1) more generously than its language would indicate." *Id.* at 10a, 13a. That view of *du Pont* is incorrect.

Du Pont is a straightforward application of Section 1369(b)(1)(E)'s plain language. Petitioners there

challenged industry-wide effluent limitations issued under Section 1311. 430 U.S. at 124. They argued that EPA lacked authority to impose binding industry-wide effluent limitations by regulation under Section 1311, that EPA could only issue "guidelines" under Section 1314, and that court of appeals jurisdiction was therefore lacking under Subsection (E). *Id.* at 124-125. The jurisdictional issue was thus "subsidiary" to and "intertwined with the issue of EPA's power to issue" binding industry-wide regulations under Section 1311. *Ibid.* This Court first held that Section 1311 empowered EPA to impose industry-wide effluent limitations by regulation. *Id.* at 126-136. And that holding "necessarily resolve[d] the jurisdictional issue" because Section 1369(b)(1)(E) "unambiguously authoriz[es]" the court of appeals to review Section 1311 effluent limitations. *Id.* at 136.

This Court in *du Pont* also rejected petitioners' fallback jurisdictional argument that Section 1369(b)(1)(E)'s reference to "section 1311" should be understood to refer only to Section 1311(c), which allows for individual variances from effluent limitations. 430 U.S. at 136. The Court explained that, "in other portions of [Section 1369], Congress referred to specific subsections" and "presumably would have specifically mentioned" Section 1311(c) if petitioners' reading were correct. *Ibid.* The Court also noted that its holding avoided "the truly perverse situation in which" courts of appeals could review NPDES permitting decisions under Section 1342 "but would have no power of direct review of the basic regulations" under Section 1311 that "govern[ed] those individual actions." *Ibid.* And the Court had "no doubt that Congress intended review of" effluent limitations on existing sources under Section 1311 "to be had in the same forum" as review of effluent limitations on new

sources under Section 1316 (*id.* at 136-137)—an obvious conclusion because Section 1369(b)(1)(E) expressly applies to "effluent limitations" issued "under section 1311" *and* "1316."

Judge McKeague misread *du Pont*. He believed that "the challenged regulation [in *du Pont*] was promulgated under" a provision that was not one of the "enumerated sections" listed in Subsection (E). Pet. App. 10a. But that was *petitioners'* argument in *du Pont*, which this Court rejected. This Court held instead that EPA had issued the challenged regulations establishing effluent limitations under Section 1311. 430 U.S. at 126-136. Judge McKeague also mistakenly claimed that this Court "eschewed a strict, literal reading" of Section 1369(b)(1)(E). Pet. App. 10a. In fact, this Court applied Subsection (E)'s "unambiguou[s]" text. 430 U.S. at 136. To be sure, this Court *mentioned* policy, but the "policy reason came *after* a plain textual rejection of the industry's position." Pet. App. 35a (Griffin, J.).

As Judge Griffin explained, it is "a far stretch to take [*du Pont*'s] dicta and expand it" to "find jurisdiction proper when a regulation's 'practical effect' only sets forth 'indirect' limits." Pet. App. 35a. "[U]nlike" *du Pont*, the agencies here "admit they have not promulgated an effluent limitation." *Ibid.* *Du Pont* does not authorize Sixth Circuit jurisdiction under Subsection (E)'s "other limitation" provision.

b. There is no stopping point to Judge McKeague's logic. Nearly any EPA action under the CWA can be said to "*indirectly* produce various limitations on point-source operators and permit issuing authorities." Pet. App. 17a. For example, an EPA administrative enforcement order under Section 1319(a)(1) certainly will impact the permit holder and the permitting

authority and has no more tenuous a connection to Section 1311 than the WOTUS Rule. Judge McKeague's ruling therefore would vest the courts of appeals with exclusive jurisdiction to review the order. Yet that result contradicts this Court's holding in *Sackett* v. *EPA*, 566 U.S. 120 (2012), that landowners may challenge EPA's administrative enforcement orders in the district courts under the APA.

Similarly, Section 1313 authorizes EPA to approve or promulgate water quality standards. 33 U.S.C. § 1313(b), (c)(3). Those standards impact point source operators and permitting authorities indirectly under Section 1311, because effluent limitations must be designed to meet water quality standards. *Id.* § 1311(b)(1)(C). Yet the courts of appeals have uniformly *agreed with EPA* that Section 1313 standards do not fall within Section 1369(b)(1)(E). See *Friends of Earth* v. *EPA*, 333 F.3d 184, 186 (D.C. Cir. 2003); *Longview Fibre Co.* v. *Rasmussen*, 980 F.2d 1307, 1311 (9th Cir. 1992); *Bethlehem Steel*, 538 F.2d at 514.

c. Judge McKeague's reading also renders superfluous parts of Subsection (E). Section 1312 water-quality-based effluent limitations impact point source operators and regulators indirectly under Section 1311 "because [Section 1312 limitations] are limitations 'necessary to meet water quality standards'" under Section 1311(b)(1)(C). *Friends of Earth*, 333 F.3d at 190. Yet "section 1369(b)(1) *expressly* provides for original appellate court review of section 1312 actions," with the result that Judge McKeague's reading renders that Subsection's "specific reference to section 1312 duplicative and unnecessary." *Ibid.* Judge McKeague's reading fails to "compor[t] with the presumption 'that statutory language is not superfluous.'" *McDonnell* v. *United States*, 136 S. Ct. 2355, 2369 (2016).

d. To be sure, some courts, like Judge McKeague, have read *Crown Simpson* and *du Pont* to authorize "a practical rather than a cramped construction" of Section 1369(b)(1) that expands courts of appeals' jurisdiction beyond EPA's issuance or denial of permits or imposition of effluent-like limitations. *NRDC* v. *EPA*, 673 F.2d 400, 405 (D.C. Cir. 1982). In *NRDC*, the court held that a challenge to Consolidated Permit Regulations that established "procedures for issuing or denying NPDES permits" fell under Subsection (F) because they were "'a limitation on point sources and permit issuers'" and "'a restriction on the untrammeled discretion of the industry.'" *Id.* at 402, 405. Similarly, in *VEPCO* v. *Costle*, 566 F.2d 446, 450 (4th Cir. 1977), the court held that standards regulating the construction of cooling water intakes were an "other limitation" because they set forth "information that must be considered in determining the type of intake structures that individual point sources may employ."

These influential decisions—from a period when courts claimed more authority to deviate from plain statutory language than is now the case—can be parsed, explained, and distinguished. See, *e.g.*, *Friends of the Earth* v. *EPA*, 333 F.3d 184, 191 n.15 (D.C. Cir. 2003). But it is soundest instead to reject their approach. Straying from the plain terms Congress used has only led to uncertainty over jurisdiction, duplicate filings and wasteful litigation, and judicial contortions in which appeals to "policy" are necessary to override the "technical criteria" specified in Section 1369(b)(1). *NRDC*, 673 F.2d at 405 n.15. More recent decisions rely on the "plain language," canons of construction, and "structural" guides to meaning that we advocate here. *Friends of the Earth*, 333 F.3d at 189-192 (holding that a Section 1313(d) total maximum daily load was not an "other limitation" within Subsection

(E)); *Friends of the Everglades*, 699 F.3d at 1286-1288 (rejecting EPA contention that water transfers rule fell under Subsections (E) and (F) as "contrary to the statutory text").

C. Congress's Specific And Narrow Focus In Section 1369(b) Confirms That The Sixth Circuit Lacks Jurisdiction.

Congress "drafted seven carefully defined bases for original jurisdiction in the appellate courts" (Pet. App. 46a (Keith, J.)), which embody "fine" "distinctions." *Longview Fibre*, 980 F.2d at 1313. Its use of this structure "justif[ies] the inference" that a general grant of jurisdiction to courts of appeals over all agency action under the CWA was "excluded by deliberate choice, not inadvertence." *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 168 (2003). As the Second Circuit put it, "the complexity and specificity" of Section 1369(b) "suggests that not all [EPA] actions" are reviewable in the courts of appeals; Congress's "specifying particular actions and leaving out others" is incompatible with cramming most EPA action under the CWA into Section 1369(b). *Bethlehem Steel*, 538 F.2d at 517; see also *Longview Fibre*, 980 F.2d at 1313 ("No sensible person accustomed to the use of words in laws would speak so narrowly and precisely of particular statutory provisions, while meaning to imply a more general and broad coverage than the statutes designated").

The need to interpret Section 1369(b) narrowly according to its plain terms takes on special force because "Congress well knows how to" grant the courts of appeals broad jurisdiction to review EPA's actions: "In [an]other statut[e], using different language, it has done just that." *Mathis* v. *United States*, 136 S. Ct. 2243, 2252 (2016).

In the CWA's sister statute, the Clean Air Act, Congress authorized the courts of appeals to review specific categories of agency action—some that must be reviewed by the D.C. Circuit and others that must be reviewed by the regional circuits. 42 U.S.C. § 7607(b)(1). Congress then went further by granting the D.C. Circuit original jurisdiction to review "*any other nationally applicable regulations* promulgated, or final action taken, by the Administrator under this chapter" and granted regional circuits jurisdiction to review "*any other final action* of the Administrator under this chapter * * * *which is locally or regionally applicable*." *Ibid.* (emphases added). Similarly broad jurisdictional language is conspicuously absent from the CWA.

Congress's decision to use different "judicial review" language in the Clean Air Act is yet another reason "counseling against construing" Section 1369(b) as embracing all nationally applicable rulemaking under the CWA. *United States* v. *Bean*, 537 U.S. 71, 76 n.4 (2002) ("'The use of different terms within related statutes generally implies that different meanings were intended'").

D. The Legislative History Suggests That Congress Did Not Intend The Courts Of Appeals To Review All Nationwide Rules.

Section 1369(b) was originally enacted as part of the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500. "The legislative history for the 1972 amendments reveals little about Congress's intent behind the CWA's judicial review provisions." Allison LaPlante *et al.*, *On Judicial Review Under the Clean Water Act in the Wake of* Decker v. Northwest Environmental Defense Center*: What We Now Know*

and What We Have Yet to Find Out, 43 ENVTL. L. 767, 776 (2013).

The agencies have repeatedly cited a fragment of an early House Report stating that the purpose of Section 1369(b) was "to establish a clear and orderly process for judicial review." H.R Rep. No. 92-911, at 136 (1972), *reprinted in* 1 Leg. Hist. of the Water Pollution Control Act of 1972 at 823 (Comm. Print 1973); *e.g.*, Fed. BIO 4-5, 19. That phrase by itself says nothing about what process is clear and orderly. And the agencies failed to acknowledge that the House at that time had proposed placing judicial review "in the district court[s]," and had emphasized that "the inclusion of section [1369] is not intended to exclude judicial review" that is "otherwise permitted by law," including under the APA. H.R. Rep. No. 92-911, at 136 (1972), 1 Leg. Hist. at 823. The House Report does not suggest that Congress intended that the courts of appeals would review nationwide regulations other than those it narrowly specified in Section 1369(b).

More illuminating are Congress's actions in passing the 1977 amendments to the CWA, which modified many parts of the Act. See Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (Dec. 27, 1977). Congress did *not* amend Section 1369. And it was not for lack of trying. With the EPA Administrator's "strong support," Senator Kennedy introduced an amendment that would have broadened Section 1369(b) to cover "national regulations promulgated under the [CWA]" and would have required those regulations to be challenged in the D.C. Circuit. 123 Cong. Rec. S. 26,754, 26,756 (Aug. 4, 1977). Senator Kennedy emphasized several times during the debate that his proposed amendment was similar to the Clean Air Act's judicial review provision. *Id.* at 26,755-56, 26,759, 26,761. He encountered strong opposition,

including concern about trying to "nickel and dime the district courts of the United States out of business." *Id.* at 26,759. The amendment was tabled and never enacted. *Id.* at 26,761.

Three days later, the Clean *Air* Act Amendments of 1977 became law, with modified judicial review language. See *supra* p. 41; Pub. L. No. 95-95, 91 Stat. 685, 776 (Aug. 7, 1977). This Court "cannot ignore Congress' decision to amend [the Clean Air Act's] relevant provisions but not make similar changes to the [CWA]." *Gross* v. *FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009). "When Congress amends one statutory provision but not another, it is presumed to have acted intentionally." *Ibid.* Indeed, "'negative implications raised by disparate provisions are strongest' when the provisions were 'considered simultaneously when the language raising the implication was inserted,'" as they were here. *Id.* at 175.

In short, all considerations based on the text, structure, related statutes, and legislative history lead to the same place: the WOTUS Rule falls outside of Section 1369(b)(1)'s provisions, and the Sixth Circuit erred in exercising jurisdiction.

II. Policy Considerations Favor Interpreting Section 1369(b) Textually To Exclude The WOTUS Rule.

The agencies contend that rules that are national in scope "are best reviewed directly in the courts of appeals." Dkt. 58, at 57 (Oct. 23, 2015). They also say they prefer to avoid having to defend rules in more than one forum, to husband their resources and avoid the risk that different courts will reach different conclusions. *Id.* at 58-59. Even if these policy considerations were valid, they "could not overcome the clarity [evident] in the statute's text." *Kloeckner* v.

Solis, 133 S. Ct. 596, 607 n.4 (2012). But there are stronger policy reasons for interpreting Section 1369(b) according to its plain text.

A. Interpreting Section 1369(b) Textually Promotes Jurisdictional Clarity.

1. This Court has emphasized countless times that "jurisdictional rules should be clear." *Lapides*, 535 U.S. at 621. "[A]dministrative simplicity is a major virtue in a jurisdictional statute." *Hertz*, 559 U.S. at 94. "[C]ourts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case." *Ibid.* Litigants benefit because clearer jurisdictional lines "promote greater predictability." *Ibid.* "[J]urisdictional rule[s]" should be interpreted in such a way as to provide litigants and courts with "clear guidance about the proper forum for [a particular claim] at the outset of the case." *Elgin* v. *Dep't of the Treasury*, 132 S. Ct. 2126, 2135 (2012).

Nebulous standards, by contrast, "invit[e] greater litigation"—as WOTUS Rule litigation illustrates. *Hertz*, 559 U.S. at 94. They "complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims." *Ibid.* "Uncertainty regarding the question of jurisdiction is particularly undesirable, and collateral litigation on the point particularly wasteful." *Grupo Dataflux* v. *Atlas Global Group, L.P.*, 541 U.S. 567, 582 (2004).

In light of those concerns, this Court "place[s] primary weight upon the need for judicial administration of a jurisdictional statute to remain as simple as possible." *Hertz*, 559 U.S. at 80. A standard that is "more straightforward and administrable than the alternative" best "serves the goals [that this Court has] consistently underscored in interpreting jurisdictional

statutes." *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Manning*, 136 S. Ct. 1562, 1573 (2016).

Our textual reading of Section 1369(b) offers a straightforward standard to determine whether jurisdiction exists under Section 1369(b)(1)(F). A court need ask only whether EPA has issued or denied a Section 1342 permit. If, as in this case, EPA has made no determination regarding a specific permit, then there is no jurisdiction under Section 1369(b)(1)(F). It is similarly straightforward to decide jurisdiction under Section 1369(b)(1)(E). A court need ask only whether EPA has issued an effluent or effluent-like limitation under Sections 1311, 1312, 1316, or 1345. If EPA has not issued an effluent or similar limitation, or if its action arises out of another section of the CWA or out of the statute as a whole (see 80 Fed. Reg. at 37,055), then the courts of appeals lack jurisdiction under Section 1369(b)(1)(E).

By contrast, Judge McKeague's "'functional' approach," which attempts to divine how "Congress's manifest purposes are best fulfilled" (Pet. App. 4a), or the *NRDC* court's "practical rather than a cramped" construction, produce uncertainty and endless litigation. Courts and parties will puzzle over whether "Congress must have intended" for review by "the circuit courts" based on "the *indirect* effect" of EPA action (Pet. App. 15a), and over what result is "practical." Those "approach[es are] at war with administrative simplicity" (*Hertz*, 559 U.S. at 92), leading to a jurisdictional "line [that] is hazy at best and incoherent at worst." *Elgin*, 132 S. Ct. at 2135.

2. To say that the meaning of each subsection in Section 1369(b) is plain on its face is not to say that the list is coherent or readily explicable by some overarching theory about what issues are best resolved at

which level of the court system. The list can be criticized as odd or arbitrary.

For example, the reference in Subsection (B) to Section 1316(b)(1)(C), though that provision was dropped in conference, suggests a lack of care in drafting.

Another example. It is unclear why review of EPA's issuance or denial of NPDES permits should belong in the courts of appeals under Subsection (F), but review of agency action in issuing or denying dredged or fill permits under Section 1344 remains in the district courts. As the agencies have pointed out (Dkt. 58 at 45), though the Corps generally processes dredge or fill permits, nevertheless "EPA plays a substantial role." Yet even EPA actions under Section 1344 that are parallel to NPDES program actions covered by Section 1369(b) are left to the district courts. See 33 U.S.C. § 1344(h) (EPA determination as to adequacy of State program), § 1344(i) (EPA authority to issue permit after disapproval of proposed State permit), § 1344(c) (EPA may determine in advance of permit application to prohibit or restrict use of a location for discharges).

Section 1369(b) draws other distinctions that are hard to fathom. Review of EPA's promulgation of a standard of performance under Section 1316 goes to the courts of appeals (Subsection (A)), as does its determination as to the adequacy of a State NPDES program (Subsection (D)). Yet an EPA determination under Section 1316(c) to approve a State procedure for applying and enforcing standards of performance is not listed in Section 1369(b) and hence is reviewed by the district courts.

But Section 1369(b) is not unusual in this regard. "[T]he *United States Code* is replete with thousands of compromises dividing initial review of agency decisions

between district and circuit courts." Joseph W. Mead & Nicholas A. Fromherz, *Choosing a Court to Review the Executive*, 67 ADMIN. L. REV. 1, 2 (2015). Congress generally "declines to explain its choice of forum," and "Congress's choices have varied dramatically—without apparent rhyme or reason—from statute to statute, year to year, and even within particular legislation." *Id.* at 15-16. "Horse Protection Act regulations can be challenged in district court, but adjudications go to the circuit court." *Id.* at 17. Department of Health and Human Services decisions regarding the approval of Medicaid state plans are challenged in district court, except that a state may challenge an adverse decision in the court of appeals. *Ibid.* Bizarre examples pepper the U.S. Code. See *id.* at 15-19. The sorts of "anomal[ies]" that the agencies want to try to eradicate by adoption of a "pragmatic construction" that looks to a statute's "objectives" (Fed. BIO 11) would lead to judicial rewriting of thousands of jurisdictional statutes. It would be an endless and ultimately arbitrary task for the courts to try to impose rationality by deducing how "Congress's manifest purposes are best fulfilled." Pet. App. 4a. The only way to make sense of jurisdictional provisions, and give parties and courts predictability, is to *apply the language as written.*

"[T]he necessity of having a clea[r] rule" governing the CWA is compelling. *Hertz*, 559 U.S. at 96. As this Court observed in *du Pont*, parties have been filing duplicative district and circuit court challenges to EPA actions since 1974. 430 U.S. at 123 n.11. Far too much ink has been spilled, and far too many public and private resources wasted, in attempting to infer whether Congress would have wanted the courts of appeals to review EPA actions that fall outside Section 1369(b)'s plain language. The Court should put an end

to this misguided practice by limiting Section 1369(b) to its text.

B. A Narrow Reading Is Necessary Due To Section 1369(b)'s Preclusion Provision.

The Court should reject the agencies' invitation to read Section 1369(b) broadly because "[r]eviewability under section 1369 carries a peculiar sting." *Longview Fibre*, 980 F.2d at 1313. Parties have "120 days" to challenge EPA actions that fall within Section 1369(b)(1) unless the challenge is "based solely on grounds which arose after such 120th day." Actions that could have been challenged "shall not be subject to judicial review in any civil or criminal proceeding for enforcement." *Id.* § 1369(b)(2); *Decker*, 133 S. Ct. at 1334 (if "available," review under Section 1369(b) is "exclusive").

Armed with Section 1369(b)'s preclusion provision, the Government might criminally prosecute someone for violating an *unlawful* EPA regulation while attempting to bar that person from challenging the regulation's lawfulness. And a conviction could result in "substantial" penalties. *U.S. Army Corps of Eng'rs* v. *Hawkes Co.*, 136 S. Ct. 1807, 1812 (2016). Negligent violations of the Act are punishable by up to 2 years' imprisonment, and knowing violations are punishable by fines up to $50,000 per day and up to 3 years in prison. 33 U.S.C. § 1319(c)(1)-(2). "[T]he consequences to landowners even for inadvertent violations can be crushing." *Hawkes*, 136 S. Ct. at 1816 (Kennedy, J., concurring).

Accepting the Sixth Circuit's judgment would "have a significant bearing on whether the Clean Water Act comports with due process." *Hawkes*, 136 S. Ct. at 1817 (Kennedy, J., concurring); see also *Sackett*, 132 S. Ct. at 1375 (Alito, J., concurring) (noting "due process"

concerns if the CWA barred landowners from challenging enforcement orders). It is "totally unrealistic to assume that more than a fraction of the persons and entities affected by a regulation" would "have knowledge of its promulgation or familiarity with or access to the Federal Register." *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 290 (1978) (Powell, J., concurring). It is even more unrealistic to assume that these persons and entities will monitor and then challenge within 120 days all CWA regulations that, years or decades later, might result in a "civil or criminal proceeding for enforcement" against them. 33 U.S.C. § 1369(b)(2). The Court accordingly should interpret Subsections (E) and (F) "as written to avoid the significant constitutional * * * questions raised by [Judge McKeague's] interpretation." *SWANCC*, 531 U.S. at 174.

The rule of lenity also requires a narrow reading of Section 1369(b) because its preclusion provision explicitly applies in a "criminal prosecution." See *Adamo Wrecking*, 434 U.S. at 285 (applying rule of lenity in interpreting Clean Air Act's preclusion provision); *Leocal* v. *Ashcroft*, 543 U.S. 1, 11 n.8 (2004) (applying rule of lenity in a civil case "[b]ecause we must interpret the statute consistently" in both a "criminal or noncriminal context"). Thus, if there is even "some doubt" as to the meaning of Subsections (E) and (F), that doubt must be resolved in favor of a narrow interpretation to avoid prejudicing criminal defendants. *Adamo Wrecking*, 434 U.S. at 285.

For pragmatic reasons as well, Section 1369(b)'s preclusion provision should "dissuad[e] [the Court] from reading § [1369](b)(1) broadly." *Am. Paper Inst.*, 882 F.2d at 289. As Judge Easterbrook explained, "the more [a court] pull[s] within § [1369](b)(1), the more arguments will be knocked out by inadvertence later

on—and the more reason firms will have to petition for review of everything in sight." *Ibid.* This Court should "express great reluctance to multiply the occasions for review [under Section 1369(b)(1)], especially when careful counsel must respond to the combination of uncertain opportunities for review and § [1369](b)(2) by filing buckshot petitions." *Roll Coater*, 932 F.2d at 671. The best way to do so is by reading Section 1369(b) textually.

C. A Narrow Reading Offers Parties, Agencies, And Courts The Benefits Of Multilateral Review Of Agency Rulemaking.

Under the Sixth Circuit's ruling, challenges to important CWA regulations would be funneled to a single court of appeals, without the benefit of initial consideration by the district courts or the opinions of other federal courts of appeals on the same issues. On some of the most critical issues under the CWA—like the regulation here—the quality of legal decision-making, and of this Court's ability to decide which cases to review, would be diminished.

Percolation among lower courts "helps to explain and formulate the underlying principles" this Court "must consider." *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2597 (2015). It also "winnows out the unnecessary and discordant elements of doctrine." *California* v. *Carney*, 471 U.S. 386, 400-401 (1985) (Stevens, J., dissenting) (citing Benjamin Cardozo, THE NATURE OF THE JUDICIAL PROCESS 179 (1921)). Accordingly, this Court typically "permit[s] several courts of appeals to explore a difficult question before [it] grants certiorari." *United States* v. *Mendoza*, 464 U.S. 154, 160 (1984).

The benefits of multi-court review accrue as clearly in the review of administrative rules as in other types of cases. See Richard L. Revesz, *Specialized Courts and*

the Administrative Lawmaking System, 138 U. PA. L. REV. 1111, 1155 (1990) (explaining "[w]hy [we] should * * * take uniform administrative decisions and subject them to review in the various regional circuit courts under a system that makes it possible for these courts to disagree with one another"). These benefits include that "the possibility of intercircuit disagreement provides a simple device for signaling that certain hard cases are worthy of additional judicial resources"; that "the doctrinal dialogue that occurs when a court of appeals addresses the legal reasoning of another and reaches a contrary conclusion * * * improves the quality of legal decisions"; and that exploration of an issue by multiple courts aids this Court "both in its consideration of the legal merits of an issue and in its case selection decisions." *Id.* at 1156-1157.

Thus, any judicial disagreements that may arise from initial consideration in multiple district courts "increase the probability of a correct disposition" (*Atchison, Topeka & Santa Fe Ry. Co.* v. *Pena*, 44 F.3d 437, 447 (7th Cir. 1994) (Easterbrook, J., concurring)), and tee up issues more thoroughly for this Court's consideration. There is nothing about agency regulations that makes this process less appropriate for rule challenges than for other types of cases, like those involving the meaning or constitutionality of federal statutes. The benefits of multi-court consideration would be lost if Section 1369(b) were stretched beyond the defined categories of agency action that Congress designated for original court of appeals review.

Furthermore, Section 1369(b) must be read in light of the default rule that Congress established in the APA, which is that agency action is subject to multilateral judicial review. "[I]n the absence or inadequacy" of a "special statutory review proceeding," any "person suffering legal wrong because of agency

action" is "entitled to judicial review" "in a court of competent jurisdiction." 5 U.S.C. §§ 702-703. A plaintiff generally may file suit where it resides. See 28 U.S.C. §§ 1331, 1391(e); see also *Bowen* v. *Massachusetts*, 487 U.S. 879, 904 (1988) (Congress "inten[ded] that [the APA] cover a broad spectrum of administrative actions, and this Court has echoed that theme by noting that the [APA's] 'generous review provisions' must be given a 'hospitable' interpretation").

In the absence of a clear statement from Congress in Section 1369(b), the Sixth Circuit should not have upended the APA judicial review process. This Court should restore APA review to CWA rulemaking outside the specific categories that Congress identified in Section 1369(b).

D. Judge McKeague's Efficiency Arguments Are Unpersuasive.

Judge McKeague believed that review of the WOTUS Rule under Section 1369(b) was necessary for "efficiency, judicial economy, clarity, uniformity and finality" (Pet. App. 23a), considerations urged too by the agencies. Fed. BIO 15-16. Those policy arguments carry little weight in practice.

Despite the APA's lengthier statute of limitations, in most cases rule challenges will be initiated very soon after the rule's promulgation. The most likely challengers are often closely involved in the notice and comment process and eager to mount challenges quickly, before a harmful rule takes effect. As a practical matter, an APA challenge is likely to come within days or weeks, not years. That is especially true for rules that have sweeping nationwide impacts, like the WOTUS Rule. The agencies issued the Rule in June 2015, and within that same year 16 district court

challenges were filed, most of them very quickly after the Rule's issuance. See *supra* p. v.

Parties may coordinate their challenges to EPA actions to avoid litigation in many different forums. For example, in litigation over EPA's Water Transfers Rule, 40 C.F.R. § 122.3(i), some environmental organizations quickly filed an APA challenge in the Southern District of New York. Nine States and a Canadian province filed a second challenge in the same court, which consolidated the actions. Eleven States, New York City, many Western water districts, and others intervened as defendants in support of the rule. See *Catskill Mountains*, 846 F.3d at 500-501 & n.6, 505-506. Environmental groups that had filed APA actions in the Southern District of Florida voluntarily dismissed those suits and intervened as plaintiffs in the New York suits. See Joint Notice of Voluntary Dismissal, *Friends of the Everglades* v. *EPA*, No. 1:08-cv-21785 consol. (S.D. Fla. Nov. 13, 2012). Thus, although multiple parties from across the country challenged the same EPA regulation, only one district court ruled on the merits of their challenges. There is reason to expect that, where CWA rule challenges proceed in district court, there will be some degree of voluntary consolidation.

It is in any event hardly certain that Judge McKeague's ruling increases efficiency. "[T]he case for direct review in circuit courts has little in the way of theoretical or empirical heft." Mead & Fromherz, *supra*, 67 ADMIN. L. REV. at 5. And "district courts are generally as capable—and usually more efficient—than their counterparts at the circuit level." *Ibid.* It is also more efficient to have the district court rather than the appellate court resolve factual disputes, such as whether the challenger has Article III standing and whether the agency has prepared a complete record.

Id. at 29, 55. In this case, the parties spent months litigating whether the agencies had provided a complete record, which caused the Sixth Circuit to hold the briefing deadlines in abeyance. See Motions to Supplement Certified Record, Dkts. 103-105 (July 8, 2016); Opinion & Order on Administrative Record, Dkt. 119 (Oct. 4, 2016); see also Order, Dkt. 116 (Sept. 22, 2016); see also Mead & Fromherz, *supra*, 67 ADMIN. L. REV. at 29-30. For these and other reasons, commentators have concluded that, all things considered, district courts generally should undertake original review of agency actions. *Id.* at 22-59.

Regardless, efficiency concerns carry no weight in this case because "policy arguments cannot supersede the clear statutory text." *Universal Health Servs., Inc.* v. *United States*, 136 S. Ct. 1989, 2002 (2016). "[N]o law pursues its purpose at all costs, and ... the textual limitations upon a law's scope are no less a part of its 'purpose' than its substantive authorizations." *Kucana*, 558 U.S. at 252. Jurisdiction is "governed by the intent of Congress" as expressed in the statutory text, "and not by any views [courts] may have about sound policy." *Fla. Power & Light Co.* v. *Lorion*, 470 U.S. 729, 746 (1985).[15] Stretching the text of Section 1369(b) past its breaking point to increase efficiency undermines the very purpose of the APA. "The APA's presumption

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[15] Judge McKeague erroneously read this Court's decision in *Florida Power* to establish in all cases a "strong preference" in favor of "direct circuit court review of agency action." Pet. App. 23a. His reliance on that "non-Clean Water Act case" is "unavailing," as Judge Griffin explained. *Id.* at 43a. *Florida Power* found the relevant "statute ambiguous on its face." 470 U.S. at 737. And its "holding depended on its lengthy exegesis of those specific statutes; nowhere did the Court intimate that it was ruling as a matter of general administrative procedure." *Nader* v. *EPA*, 859 F.2d 747, 754 (9th Cir. 1988).

of judicial review is a repudiation of the principle that efficiency of regulation conquers all." *Sackett*, 132 S. Ct. at 1374. Section 1369(b)'s plain language controls, and that language does not vest the Sixth Circuit with jurisdiction to review the WOTUS Rule.

CONCLUSION

The judgment should be reversed and the case remanded with instructions to dismiss for lack of jurisdiction.

Respectfully submitted.

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APRIL 2017

ADDENDUM OF STATUTORY PROVISIONS

33 U.S.C. § 1311. Effluent Limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

(b) Timetable for achievement of objectives

In order to carry out the objective of this chapter there shall be achieved—

(1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314(b) of this title, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 1317 of this title; and

(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 1283 of this title prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 1314(d)(1) of this title; or,

(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment

standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

(2)(A) for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 1325 of this title), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 1317 of this title;

* * * * *

(C) with respect to all toxic pollutants referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989;

(D) for all toxic pollutants listed under paragraph (1) of subsection (a) of section 1317 of this title which are not referred to in subparagraph (C) of this paragraph compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable, but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989;

(E) as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989, compliance with effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which in the case of pollutants identified pursuant to section 1314(a)(4) of this title shall require application of the best conventional pollutant control technology as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(4) of this title; and

(F) for all pollutants (other than those subject to subparagraphs (C), (D), or (E) of this paragraph) compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than 3 years after the date such limitations are established, and in no case later than March 31, 1989.

(3)(A) for effluent limitations under paragraph (1)(A)(i) of this subsection promulgated after January 1, 1982, and requiring a level of control substantially greater or based on fundamentally different control technology than under permits for an industrial category issued before such date, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989; and

(B) for any effluent limitation in accordance with paragraph (1)(A)(i), (2)(A)(i), or (2)(E) of this subsection established only on the basis of section 1342(a)(1) of this title in a permit issued after February 4, 1987, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are established, and in no case later than March 31, 1989.

* * * * *

(e) All point discharge source application of effluent limitations

Effluent limitations established pursuant to this section or section 1312 of this title shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this chapter.

(f) Illegality of discharge of radiological, chemical, or biological warfare agents, high-level radioactive waste, or medical waste

Notwithstanding any other provisions of this chapter it shall be unlawful to discharge any radiological, chemical, or biological warfare agent, any high-level radioactive waste, or any medical waste, into the navigable waters.

* * * * *

(k) Innovative technology

In the case of any facility subject to a permit under section 1342 of this title which proposes to comply with the requirements of subsection (b)(2)(A) or (b)(2)(E) of this section by replacing existing production capacity with an innovative production process which will result in an effluent reduction significantly greater than that required by the limitation otherwise applicable to such facility and moves toward the national goal of eliminating the discharge of all pollutants, or with the installation of an innovative control technique that has a substantial likelihood for enabling the facility to comply with the applicable effluent limitation by achieving a significantly greater effluent reduction than that required by the applicable effluent limitation and moves toward the national goal of eliminating the discharge of all pollutants, or by achieving the required reduction with an

innovative system that has the potential for significantly lower costs than the systems which have been determined by the Administrator to be economically achievable, the Administrator (or the State with an approved program under section 1342 of this title, in consultation with the Administrator) may establish a date for compliance under subsection (b)(2)(A) or (b)(2)(E) of this section no later than two years after the date for compliance with such effluent limitation which would otherwise be applicable under such subsection, if it is also determined that such innovative system has the potential for industrywide application.

* * * * *

33 U.S.C. § 1312. Water Quality Related Effluent Limitations

(a) Establishment

Whenever, in the judgment of the Administrator or as identified under section 1314(*l*) of this title, discharges of pollutants from a point source or group of point sources, with the application of effluent limitations required under section 1311(b)(2) of this title, would interfere with the attainment or maintenance of that water quality in a specific portion of the navigable waters which shall assure protection of public health, public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water, effluent limitations (including alternative effluent control strategies) for such point source or sources shall be established which can reasonably be expected to contribute to the attainment or maintenance of such water quality.

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33 U.S.C. § 1314. Information and Guidelines

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(*l*) Individual control strategies for toxic pollutants

(1) State list of navigable waters and development of strategies

Not later than 2 years after February 4, 1987, each State shall submit to the Administrator for review, approval, and implementation under this subsection—

(A) a list of those waters within the State which after the application of effluent limitations required under section 1311(b)(2) of this title cannot reasonably be anticipated to attain or maintain (i) water quality standards for such waters reviewed, revised, or adopted in accordance with section 1313(c)(2)(B) of this title, due to toxic pollutants, or (ii) that water quality which shall assure protection of public health, public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water;

(B) a list of all navigable waters in such State for which the State does not expect the applicable standard under section 1313 of this title will be achieved after the requirements of sections 1311(b), 1316, and 1317(b) of this title are met, due entirely or substantially to discharges from point sources of any toxic pollu-

tants listed pursuant to section 1317(a) of this title;

(C) for each segment of the navigable waters included on such lists, a determination of the specific point sources discharging any such toxic pollutant which is believed to be preventing or impairing such water quality and the amount of each such toxic pollutant discharged by each such source; and

(D) for each such segment, an individual control strategy which the State determines will produce a reduction in the discharge of toxic pollutants from point sources identified by the State under this paragraph through the establishment of effluent limitations under section 1342 of this title and water quality standards under section 1313(c)(2)(B) of this title, which reduction is sufficient, in combination with existing controls on point and nonpoint sources of pollution, to achieve the applicable water quality standard as soon as possible, but not later than 3 years after the date of the establishment of such strategy.

(2) Approval or disapproval

Not later than 120 days after the last day of the 2-year period referred to in paragraph (1), the Administrator shall approve or disapprove the control strategies submitted under paragraph (1) by any State.

(3) Administrator's action

If a State fails to submit control strategies in accordance with paragraph (1) or the Administrator does not approve the control strategies submitted

by such State in accordance with paragraph (1), then, not later than 1 year after the last day of the period referred to in paragraph (2), the Administrator, in cooperation with such State and after notice and opportunity for public comment, shall implement the requirements of paragraph (1) in such State. In the implementation of such requirements, the Administrator shall, at a minimum, consider for listing under this subsection any navigable waters for which any person submits a petition to the Administrator for listing not later than 120 days after such last day.

* * * * *

33 U.S.C. § 1316. National Standards of Performance

(a) Definitions

For purposes of this section:

(1) The term "standard of performance" means a standard for the control of the discharge of pollutants which reflects the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants.

(2) The term "new source" means any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance under this section which will be applicable to such source, if such standard is thereafter promulgated in accordance with this section.

(3) The term "source" means any building, structure, facility, or installation from which there is or may be the discharge of pollutants.

(4) The term "owner or operator" means any person who owns, leases, operates, controls, or supervises a source.

(5) The term "construction" means any placement, assembly, or installation of facilities or equipment (including contractual obligations to purchase such facilities or equipment) at the premises where such equipment will be used, including preparation work at such premises.

(b) Categories of sources; Federal standards of performance for new sources

(1)(A) The Administrator shall, within ninety days after October 18, 1972, publish (and from time to time thereafter shall revise) a list of categories of sources * * *.

* * * * *

(B) As soon as practicable, but in no case more than one year, after a category of sources is included in a list under subparagraph (A) of this paragraph, the Administrator shall propose and publish regulations establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within one hundred and twenty days after publication of such proposed regulations, such standards with such adjustments as he deems appropriate. The Adminis-

trator shall, from time to time, as technology and alternatives change, revise such standards following the procedure required by this subsection for promulgation of such standards. Standards of performance, or revisions thereof, shall become effective upon promulgation. In establishing or revising Federal standards of performance for new sources under this section, the Administrator shall take into consideration the cost of achieving such effluent reduction, and any non-water quality, environmental impact and energy requirements.

* * * * *

(c) State enforcement of standards of performance

Each State may develop and submit to the Administrator a procedure under State law for applying and enforcing standards of performance for new sources located in such State. If the Administrator finds that the procedure and the law of any State require the application and enforcement of standards of performance to at least the same extent as required by this section, such State is authorized to apply and enforce such standards of performance (except with respect to new sources owned or operated by the United States).

* * * * *

33 U.S.C. § 1317 – Toxic And Pretreatment Effluent Standards

(a) Toxic Pollutant List; Revision; Hearing; Promulgation of Standards; Effective Date; Consultation.

(1) On and after December 27, 1977, the list of toxic pollutants or combination of pollutants subject to this chapter shall consist of those toxic pollutants listed in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives, and the Administrator may revise such list and the Administrator is authorized to add to or remove from such list any pollutant. * * *

(2) Each toxic pollutant listed in accordance with paragraph (1) of this subsection shall be subject to effluent limitations resulting from the application of the best available technology economically achievable for the applicable category or class of point sources established in accordance with sections 1311(b)(2) and 1314(b)(2) of this title.

* * * * *

(b) Pretreatment Standards; Hearing; Promulgation; Compliance Period; Revision; Application to State and Local Laws.

(1) The Administrator shall, within one hundred and eighty days after October 18, 1972, and from time to time thereafter, publish proposed regulations establishing pretreatment standards for introduction of pollutants into treatment works (as defined in section 1292 of this title) which are publicly owned for those pollutants which are determined not to be susceptible to treatment by

such treatment works or which would interfere with the operation of such treatment works. Not later than ninety days after such publication, and after opportunity for public hearing, the Administrator shall promulgate such pretreatment standards. Pretreatment standards under this subsection shall specify a time for compliance not to exceed three years from the date of promulgation and shall be established to prevent the discharge of any pollutant through treatment works (as defined in section 1292 of this title) which are publicly owned, which pollutant interferes with, passes through, of otherwise is incompatible with such works. * * *

(2) The Administrator shall, from time to time, as control technology, processes, operating methods, or other alternatives change, revise such standards following the procedure established by this subsection for promulgation of such standards.

* * * * *

(c) New Sources of Pollutants into Publicly Owned Treatment Works.

In order to insure that any source introducing pollutants into a publicly owned treatment works, which source would be a new source subject to section 1316 of this title if it were to discharge pollutants, will not cause a violation of the effluent limitations established for any such treatment works, the Administrator shall promulgate pretreatment standards for the category of such sources simultaneously with the promulgation of standards of performance under section 1316 of this title for the equivalent category of new sources. Such pretreatment standards shall pre-

vent the discharge of any pollutant into such treatment works, which pollutant may interfere with, pass through, or otherwise be incompatible with such works.

* * * * *

33 U.S.C. § 1342. National Pollutant Discharge Elimination System

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

* * * * *

(b) State permit programs

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each submitted program unless he determines that adequate authority does not exist:

* * * * *

(c) Suspension of Federal program upon submission of State program; withdrawal of approval of State program; return of State program to Administrator

* * * * *

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall with-

draw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

* * * * *

(d) Notification of Administrator

(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this chapter. Whenever the Administrator objects to the issuance of a permit under this paragraph such written objection shall contain a statement of the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator.

(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

(4) In any case where, after December 27, 1977, the Administrator, pursuant to paragraph (2) of this subsection, objects to the issuance of a per-

mit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing, or, if no hearing is requested within 90 days after the date of such objection, the Administrator may issue the permit pursuant to subsection (a) of this section for such source in accordance with the guidelines and requirements of this chapter.

* * * * *

(*l*) Limitation on permit requirement

(1) Agricultural return flows

The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit.

(2) Stormwater runoff from oil, gas, and mining operations

The Administrator shall not require a permit under this section, nor shall the Administrator directly or indirectly require any State to require a permit, for discharges of stormwater runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities, composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with, or do not come into contact with, any overburden, raw material,

intermediate products, finished product, byproduct, or waste products located on the site of such operations.

(3) Silvicultural activities

(A) NPDES permit requirements for silvicultural activities

The Administrator shall not require a permit under this section nor directly or indirectly require any State to require a permit under this section for a discharge from runoff resulting from the conduct of the following silviculture activities conducted in accordance with standard industry practice: nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance.

* * * * *

(p) Municipal and industrial stormwater discharges

(1) General rule

Prior to October 1, 1994, the Administrator or the State (in the case of a permit program approved under this section) shall not require a permit under this section for discharges composed entirely of stormwater.

(2) Exceptions

Paragraph (1) shall not apply with respect to the following stormwater discharges:

(A) A discharge with respect to which a permit has been issued under this section before February 4, 1987.

(B) A discharge associated with industrial activity.

(C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.

(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.

(E) A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

* * * * *

(6) Regulations

Not later than October 1, 1993, the Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5)) which designate stormwater discharges, other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and manage-

ment practices and treatment requirements, as appropriate.

* * * * *

33 U.S.C. § 1345. Disposal or Use of Sewage Sludge

(a) Permit

Notwithstanding any other provision of this chapter or of any other law, in any case where the disposal of sewage sludge resulting from the operation of a treatment works as defined in section 1292 of this title (including the removal of in-place sewage sludge from one location and its deposit at another location) would result in any pollutant from such sewage sludge entering the navigable waters, such disposal is prohibited except in accordance with a permit issued by the Administrator under section 1342 of this title.

(b) Issuance of permit; regulations

The Administrator shall issue regulations governing the issuance of permits for the disposal of sewage sludge subject to subsection (a) of this section and section 1342 of this title. Such regulations shall require the application to such disposal of each criterion, factor, procedure, and requirement applicable to a permit issued under section 1342 of this title.

(c) State permit program

Each State desiring to administer its own permit program for disposal of sewage sludge subject to subsection (a) of this section within its jurisdiction may do so in accordance with section 1342 of this title.

* * * * *

(2) Identification and regulation of toxic pollutants

(A) On basis of available information

(i) Proposed regulations

Not later than November 30, 1986, the Administrator shall identify those toxic pollutants which, on the basis of available information on their toxicity, persistence, concentration, mobility, or potential for exposure, may be present in sewage sludge in concentrations which may adversely affect public health or the environment, and propose regulations specifying acceptable management practices for sewage sludge containing each such toxic pollutant and establishing numerical limitations for each such pollutant for each use identified under paragraph (1)(A).

(ii) Final regulations

Not later than August 31, 1987, and after opportunity for public hearing, the Administrator shall promulgate the regulations required by subparagraph (A)(i).

(B) Others

(i) Proposed regulations

Not later than July 31, 1987, the Administrator shall identify those toxic pollutants not identified under subparagraph (A)(i) which may be present in sewage sludge in concentrations which may adversely affect public health or the environment, and propose regulations specifying acceptable management practices for

sewage sludge containing each such toxic pollutant and establishing numerical limitations for each pollutant for each such use identified under paragraph (1)(A).

(ii) Final regulations

Not later than June 15, 1988, the Administrator shall promulgate the regulations required by subparagraph (B)(i).

(C) Review

From time to time, but not less often than every 2 years, the Administrator shall review the regulations promulgated under this paragraph for the purpose of identifying additional toxic pollutants and promulgating regulations for such pollutants consistent with the requirements of this paragraph.

(D) Minimum standards; compliance date

The management practices and numerical criteria established under subparagraphs (A), (B), and (C) shall be adequate to protect public health and the environment from any reasonably anticipated adverse effects of each pollutant. Such regulations shall require compliance as expeditiously as practicable but in no case later than 12 months after their publication, unless such regulations require the construction of new pollution control facilities, in which case the regulations shall require compliance as expeditiously as practicable but in no case later than two years from the date of their publication.

(3) Alternative standards

For purposes of this subsection, if, in the judgment of the Administrator, it is not feasible to prescribe or enforce a numerical limitation for a pollutant identified under paragraph (2), the Administrator may instead promulgate a design, equipment, management practice, or operational standard, or combination thereof, which in the Administrator's judgment is adequate to protect public health and the environment from any reasonably anticipated adverse effects of such pollutant. In the event the Administrator promulgates a design or equipment standard under this subsection, the Administrator shall include as part of such standard such requirements as will assure the proper operation and maintenance of any such element of design or equipment.

* * * * *

(f) Implementation of regulations

(1) Through section 1342 permits

Any permit issued under section 1342 of this title to a publicly owned treatment works or any other treatment works treating domestic sewage shall include requirements for the use and disposal of sludge that implement the regulations established pursuant to subsection (d) of this section, unless such requirements have been included in a permit issued under the appropriate provisions of subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. § 6921 et seq.], part C of the Safe Drinking Water Act [42 U.S.C.A. § 300h et seq.], the Marine Protection, Research, and Sanctuaries Act of 1972 [33 U.S.C.A. § 1401 et seq.], or the Clean Air Act [42 U.S.C.A. § 7401 et seq.], or under

State permit programs approved by the Administrator, where the Administrator determines that such programs assure compliance with any applicable requirements of this section.

* * * * *

U.S.C. § 1369. Administrative Procedure and Judicial Review

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(b) Review of Administrator's actions; selection of court; fees

(1) Review of the Administrator's action (A) in promulgating any standard of performance under section 1316 of this title, (B) in making any determination pursuant to section 1316(b)(1)(C) of this title, (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title, (D) in making any determination as to a State permit program submitted under section 1342(b) of this title, (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, (F) in issuing or denying any permit under section 1342 of this title, and (G) in promulgating any individual control strategy under section 1314(l) of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action upon application by such person. Any such application shall be made within 120 days from the date of such determination, approval, promulgation, issuance or denial, or after such

date only if such application is based solely on grounds which arose after such 120th day.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement.

* * * * *